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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 594

UNION PACIFIC RAILROAD COMPANY, A CORPORATION; CITY OF KANSAS CITY, KANSAS; DON C. McCOMBS, FRANCIS BLAKE AND GEORGE T. DARBY, COMMISSIONERS, ETC., ET AL.,

Appellants,

vs.

THE UNITED STATES OF AMERICA, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, ET AL.,

Appellees.

BRIEF FOR APPELLEES OTHER THAN UNITED STATES.

WILLIAM E. KEMP,
HALE HOUTS,
LESLIE A. WELCH,
ANDREW C. SCOTT,
ROLAND J. LEHMAN,
JOHN N. MONTEITH,
CHRISTOPHER B. GARNETT,
JONATHAN C. GIBSON,

Counsel for City of Kansas City, Missouri; Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, Trustees of The Chicago, Rock Island and Pacific Railway Company; Guy A. Thompson, Trustee of Missouri Pacific Railroad Company; Chicago, Burlington & Quincy Railroad Company; and The Atchison, Topeka and Santa Fe Railway Company, Appellees.

April 2, 1941.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 594

UNION PACIFIC RAILROAD COMPANY, A CORPORATION; CITY OF KANSAS CITY, KANSAS; DON C. McCOMBS, FRANCIS BLAKE AND GEORGE T. DARBY, COMMISSIONERS, ETC., ET AL.,

Appellants,

vs.

THE UNITED STATES OF AMERICA, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, ET AL.,

Appellees.

BRIEF FOR APPELLEES OTHER THAN UNITED STATES.

STATEMENT.

This brief is filed in answer to the brief for appellants. It is filed on behalf of the City of Kansas City, Missouri, The Atchison, Topeka and Santa Fe Railway Company, Chicago, Burlington & Quincy Railroad Company, Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, Trustees of The Chicago, Rock Island and Pacific Railway

Company, and Guy A. Thompson, Trustee of Missouri Pacific Railroad Company.[1]

On motion of the United States in open court on January 3, 1940, and without objection at that time from the appellants, the lower court made the City of Kansas City, Missouri, the Santa Fe, the Burlington, the Rock Island, and the Missouri Pacific additional parties plaintiff.[2] The parties thus brought into the case joined in the allegations and prayers for relief in the complaint filed by the United States.[3] The appellant Union Pacific, on January 23, 1940, filed a motion to vacate and set aside the order making additional parties plaintiff.[4] This motion was overruled.[5]

The additional parties plaintiff adopt the brief and argument submitted in this case on behalf of the United States. The purpose of this brief is merely to supplement the Government's brief in certain respects, particularly to relate the evidence supporting the court's findings of fact, and to cover some questions more immediately affecting the interests of the other appellees.

The other appellees as well as the Government are unable to accept as accurate appellants' statement of facts and deem that it can be best corrected by a complete new statement such as made by the Government. The appellants have employed over 100 pages of statement in an effort to paint the Union Pacific out of the picture and make it appear that the City of Kansas City, Kansas, is the bold adventurer who conceived and dominated the attempted execution of the plan to move the eighty-year old Kansas

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[1] Hereafter, the City of Kansas City, Kansas, will usually be referred to simply as the City; where the City of Kansas City, Missouri, is meant, its full name will be used. The railroads will sometimes be referred to as the Union Pacific, Santa Fe, Burlington, Rock Island, and Missouri Pacific or as the appellee railroads, or with the City of Kansas City, Missouri, as the other appellees.

[2] R. 93.

[3] R. 401-3, 411-12.

[4] R. 167-8.

[5] R. 184.

City, Missouri, produce business to the Kansas river levee served only by the rails of the Union Pacific.

The Government's statement gives the Union Pacific its true and correct prominence and place in the record. This is supplemented in the argument which follows by references to the testimony and to the history of events currently chronicled by Union Pacific officials in their letters and memoranda which are in evidence as exhibits in this case.[1]

ARGUMENT.

I.

Court Below Properly Granted Relief to Appellees from Threatened Irreparable Injury from Unfair Competitive Methods Prohibited by Statute.

The appellants contend that the Court below erred in permitting alleged losses to appellee railroads of revenue upon competitive traffic to be made a controlling element in the conduct and disposition of the case.[2] This is a quite inaccurate description of what the Court did in granting relief to the other appellees as well as of the grounds for its action.

The controlling factor in the case from the beginning to the end was the purpose on the part of the Government to enforce the statutes of the United States regulating interstate commerce and to put a stop to their violation by the appellants. The complaint, filed with this end in view, necessarily included allegations of the circumstances under which the rebates, concessions, advantages, and discriminations[3] were given, which, since the ban on these

[1] Particularly Exhibits 2-16, R. 1483-2039; Exhibit 27, R. 2173-80, and Exhibit 28, R. 2181-2213, which alone are sufficient entirely to discredit appellants' version of the facts.

[2] Brief for Appellants, pp. 236-44.

[3] Sometimes hereafter for the purpose of brevity collectively referred to as concessions.

practices is inherently a ban on unfair methods of competition, included a description of the competitive situation, showing the motive of the appellants and bringing out the need for interlocutory relief to avoid irreparable injury. The situation was such that if relief were postponed until after the end of the proceedings the purpose of the appellants in bringing about by illegal means the transfer of the produce business from one terminal to the other might already have been accomplished, thus setting the law at naught.

The statutes were enacted for the purpose of protecting law-abiding shippers and carriers from the evils of rebates and concessions given or received by their less scrupulous competitors.[1] This being the purpose of the statute, one of the incidental duties of the law-enforcing agencies is to protect wherever possible the victims of the unlawful practices, and the Government appropriately set out to do so by asking for immediate interlocutory relief which would prevent irreparable injury to these victims.

The suit was civil, not criminal, in nature, and the Government was entitled to the incidental assistance, if it so desired, of the injured parties in making proof of the unlawful transactions. Section 3 of the Elkins Act specifically authorizes the Court "to make such other persons or corporations parties thereto as the court may deem necessary" in a suit of this kind.[2]

The other appellees willingly consented to being brought into the case. Their own interests were vitally affected, as

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[1] Cullom Report; Senate Report 46, 49th Con., 1st Sess., pp. 188-90, 215; Annual Report of the Interstate Commerce Commission, 1897, pp. 47-8. See also testimony of Charles Francis Adams, President, Union Pacific Railroad Company, before Cullom Committee, June 23, 1885, Senate Report 46, Part 2, pp. 1210-12, 49th Cong., 1st Sess.

[2] Section 3 of the Elkins Act, 49 U. S. C. 43, reads in part:

"* * * whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published

shown by the complaint,[1] the opinion below,[2] and the findings of fact.[3] They were threatened with irreparable injury.[4] They asked relief not from fair competition lawfully engaged in but from unfair competition pursued by methods specifically prohibited by statute. They asked for relief not from unauthorized competition but from competition carried out by illegal methods and threatening them with irreparable injury. Whether they are entitled, along with the Government, to relief because of proven injury, irreparable in character, turns upon the question of the legality of the methods employed by the appellants to transfer the produce center of Greater Kansas City from the long established produce district of Kansas City, Missouri, to the new Kansas City Food Terminal in Kansas City, Kansas, and to divert annually hundreds of thousands of dollars in revenue on produce traffic moving into Kansas City from origin territory from the Burlington, Rock Island, Missouri Pacific, and Santa Fe to the Union Pacific. The relief for which the other appellees contend is predicated solely upon the illegality of the methods of competition employed by the appellants.

For the past eighty years the produce center of Greater Kansas City has been located in the produce district of Kansas City, Missouri, served by numerous interstate railroads, including the Union Pacific and the appellee rail-

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rates on file, or is committing any discriminations forbidden by law, a petition may be presented alleging such facts * * * * * * * whereupon it shall be the duty of the court summarily to inquire into the circumstances, upon such notice and in such manner as the court shall direct and without the formal pleadings and proceedings applicable to ordinary suits in equity, and to make such other persons or corporations parties thereto as the court may deem necessary, * * *"

See also Section 2 of the Elkins Act, Section 45(a) of the Judicial Code, 28 U. S. C., 45(a), and Rule 20(a) of the Rules of Civil Procedure.

[1] Complaint, R. 2, 8-19.

[2] Opinion below, R. 245-6.

[3] Finding of Fact 7, R. 261-2; Findings of Fact 20-22, R. 272-3; Findings of Fact 25-28, R. 275-9.

[4] Complaint, R. 9; Findings of Fact 35-6, R. 360-62.

roads. All of the wholesale produce dealers who were defendants below and to whom the special inducements to move were offered or given by the appellants were engaged in business in this district,[1] and were shippers of produce by railroad in interstate commerce. Some of these wholesale dealers were engaged in business in a municipal market building owned by the City of Kansas City, Missouri, while others transacted their business in privately owned stores, offices, markets, and warehouses, some owned by the dealers themselves and some by other persons. The aggregate value of these buildings is substantial. A great part of the value of this property would be destroyed and large losses would be visited upon the property owners and upon the commerce and trade of Kansas City, Missouri, should the appellants succeed in moving the produce center to another location. Once the wholesale dealers moved away, the established market would be destroyed and the loss would be irreparable.[2]

The major portion of the produce bought and sold in the established produce district of Kansas City, Missouri, is brought in by a number of competing railroads, including the appellant Union Pacific and appellees—the Burlington, the Missouri Pacific, the Rock Island, and the Santa Fe. The new Kansas City Food Terminal in Kansas City, Kansas, however, is located solely on the lines of the appellant Union Pacific,[3] with the exception that the Missouri Pacific serves the cold storage plant of the new terminal jointly with the Union Pacific, and this railroad has an advantage over competing lines with respect to traffic handled to or from the new terminal for the reason that a railroad on whose line a shipper is located enjoys a substantial advantage in the solicitation of competitive traffic. Should

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[1] Finding of Fact 7, R. 342.
[2] Finding of Fact 35, R. 360-61.
[3] Finding of Fact 8, R. 342-3; Finding of Fact 36, R. 361.

the wholesale dealers be induced to move their places of business from the established produce district in Missouri to the new terminal in Kansas, the result would be to divert shipments of produce traffic from the appellee railroads to the Union Pacific, and such diversion would cause a loss of approximately $600,000 a year to the Santa Fe, a loss of approximately $100,000 to the Missouri Pacific, a loss of approximately $60,000 to the Burlington, and a substantial loss annually to the Rock Island—and such loss and diversion would be continuous and one for which there would be no adequate remedy at law.[1]

The question is whether, under these circumstances, the Union Pacific and the City may properly give cash bonuses, free rent, reduced rent, inadequate rent, rental credits, free advertising, free trips, and other things of value as gratuities and special inducements to persuade the shippers of produce by railroad in interstate commerce to move from the Missouri produce district to the new Kansas City Food Terminal, which the Union Pacific and the City together have promoted, financed, and constructed, and which they are now operating. The question turns upon the legality of these inducements, in view of the circumstances under which they have been offered or given.

II.

Both the Union Pacific and the City Offered and Gave Concessions

The District Court found that rebates, concessions, advantages, and discriminations were offered or given by both of the appellants as well as by DeOreo, Fearn and others.[2] There is an abundance of evidence to support this finding.

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[1] Finding of Fact 36, R. 351-2.
[2] Findings of Fact 19 and 20, R. 351-4.

1. *Union Pacific Both Offered and Gave Free Advertising and Free Trips.*

The appellants, while apparently admitting that the Union Pacific participated in negotiations for some or all of the concessions, have avoided any admission that it offered concessions, and they have strenuously denied that it gave any. They not only strenuously insist that none of the payments can be successfully traced to a Union Pacific source, but they also say that the evidence is undisputed on this point. The evidence however is overwhelmingly the other way. This is notably true about the free trips and free advertising with respect to which the Union Pacific was a little less careful in concealing its own treasury as the source of the payments.

(1) *Free Trips.*

In March, 1938, the Union Pacific sponsored and financed the trip of fifteen Missouri produce dealers to visit other produce terminals in Chicago, Detroit, Cleveland, Buffalo and St. Louis.[1] Free railroad transportation, free meals, free hotel accommodations, and free entertainment were furnished. The party was in charge of Mr. C. C. Weedin, General Freight and Passenger Agent of the Union Pacific at Kansas City, and Mr. DeOreo.[2] Union Pacific traffic representatives in the cities visited cooperated in guiding the party around the terminals and in providing entertainment.[3]

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[1] Ex. 4, p. 24, R. 1572; Ex. 5, pp. 14, 57, R. 1585-6; Stanley to Haugh, February 26, 1938, Ex. 13, p. 67, R. 1840-41; Stanley to Haugh, March 5, 1938, Ex. 13, p. 73, R. 1844.

[2] Haugh to Mitchell, March 3, 1938, Ex. 5, p. 2, R. 1577-8; Haugh to Benham, March 5, 1938, Ex. 5, p. 3, R. 1578; Weedin to Haugh, March 7, 1938, Ex. 5, p. 6, R. 1579.

[3] Haugh to Benham, March 5, 1938, Ex. 5, p. 3, R. 1578; Weedin to Stanley, March 7, 1938, Ex. 13, pp. 74-7, R. 1844-48; Weedin to Stanley, March 9, 1938, Ex. 13, pp. 78-9, R. 1848-50; Weedin to Stanley, March 9, 1938, Ex. 13, pp. 80-1, R. 1850-52.

There is some pretense that the trip was not financed by the Union Pacific but by the City, or by DeOreo and Fean, the so-called promoters of the terminal who were trying to secure the support of the produce dealers. There was an attempt, it is true, to handle the transaction in such a way as to indicate that the money for the trip was not an expenditure by the Union Pacific but a loan by it to DeOreo and Fean, or to the City. The trip was arranged at a meeting of Mr. Stanley, Executive Assistant of the Union Pacific and Mr. DeOreo with the merchants committee.[1] Assisting them in the promotion of the new terminal, Vice-President Haugh of the Union Pacific recognized that it would be necessary for the Union Pacific to pay the expenses of the trip and he planned to have the necessary cash placed in Mr. Weedin's hands.[2] There was a change in plans, however, and the money was given to Mr. Stanley, who gave it to Mr. DeOreo [3] who in turn actually paid the bills during the trip. Messrs. DeOreo and Fean were asked to sign a receipt running to Mr. Breidenthal, President of the Riverview State Bank, promising to repay the money to him "in the event that the proposed food terminal is financed by Kansas City, Kansas, and leased by the undersigned as such exclusive agents, * * * but in the event that said food terminal is not built or financed, the aforesaid sum shall not be repaid." [4] Mr. Fean was induced to sign the receipt only with difficulty; he did not go on the trip and he objected to DeOreo

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[1] Memorandum by Stanley, Feb. 19, 1938, R. 1572.

[2] "Will appreciate it if you will arrange to have Mr. Weedin accompany the party of perishable merchants, leaving Kansas City, Sunday, for a trip to the fruit and vegetable markets at Chicago, Detroit, Cleveland and Buffalo. It will be necessary to pay the expenses of this trip, . . I am arranging to have the cash placed in Mr. Weedin's hands, Saturday, to pay the expenses of the trip. I will be in Kansas City, tomorrow, Friday, and talk with him more fully about it." Haugh to Mitchell, March 3, 1938, Ex. 5, p. 2.

[3] Fean, R. 582-3, 585; DeOreo, R. 625.

[4] Ex. 31, 39, R. 2243.

getting an dspending the money.[1] An attempt was made to get the City to agree to repay the expenditure as an outlay made in its behalf,[2] but difficulty was encountered,[3] and after the trip was over, Mayor McCombs said it would be embarassing to the City to enter into any arrangement at that stage about reimbursing the Union Pacific. Thereupon the Union Pacific officials purported to rely on having the money repaid by DeOreo and Fean out of their commissions as rental agents.[4] But they were not unconditionally bound; their only engagement was to make the repayment if the terminal was built and if they got their commissions as rental agents. Their rental agency contract with the City was later cancelled at the insistence of the Public Works Administration, which required the City to promise to pay no fees to the rental agents.[5]

[1] Fean, R. 582.

[2] Haugh to Stanley, Feb. 26, 1938, Ex. 13, p. 67, R. 1840-41.

[3] "On account of the situation discussed with you by telephone, I am unable to make any headway on this matter and will await the return of Mr. Breidenthal from Topeka." Stanley to Haugh, Feb. 28, 1938, Ex. 13, p. 69, R. 1842.

[4] "The same matters were discussed with you over the telephone and you were advised that Mayor McCombs thought it would be embarrassing for him to enter into any arrangement at this stage about reimbursing the Union Pacific. He is not personally adverse to the suggestion but views the matter entirely from a public policy standpoint and the fact that such an arrangement would endanger the whole project. Following my talk with Mayor McCombs and Mr. Breidenthal, you advanced $2,000 for which I have furnished receipts and the entire amount was turned over to Messrs. Fean and DeOreo to pay the expenses of recent merchants trip to eastern food terminals. It was agreed that this money would be returned to us by Fean and DeOreo out of their commission provided the food terminal was constructed."—Stanley to Haugh, March 25, 1938, Ex. 13, p. 87, R. 1856. Stanley says the arrangement was for the City to make the repayment if Fean and DeOreo didn't. R. 1033-4.

[5] Skinner, R. 770-71; McCombs and Schaible to Ickes, Oct. 7, 1938, Ex. 6, p. 26, R. 1624-5.

The Public Works Administration made the grant subject to the condition that no rental agency fees be paid to Fean and DeOreo, the conditions reading:

"(c) All fees to be paid real estate agents, directly or indirectly, shall be eliminated:

(d) That certain contracts entered into June 16, 1938, between Applicant and Joseph DeOreo and William Fean, whereby the latter are employed to secure tenants for the Project, shall be abrogated; Ordinance No. 29906 authorising

The City officials at no time promised to repay any of the advances which the Union Pacific made to Messrs. Fean and DeOreo; they specifically stated that the City was under no obligation to pay the expenses of any of the Union Pacific officials or others whose expenses were advanced by the Union Pacific.[1]

The Union Pacific officials knew that they could not lawfully make gifts to shippers [2] and for this reason they constantly endeavored to hide their own participation in offering or giving the concessions. The roundabout course followed in financing the trip of the shippers to the other terminals is probably explainable on this ground, but it is unnecessary to pursue the inquiry. The fact remains that the Union Pacific—the only one, as President Jeffers said, who could advance the money [3]—advanced it for financing the trip when it knew that it might or might not secure repayment. One of its officials, Mr. Stanley, and one of its agents,

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said contract shall be rescinded and repealed; any and all other contracts of like tenor shall be duly abrogated; and no further contracts or agreements of such or of similar tenor shall be authorized, made or executed;"—Federal Emergency Administrator of Public Works to City of Kansas City, Kansas, Oct. 24, 1938, Ex. 6, p. 40, R. 1632-3.

[1] "That the City Commissioners in his presence had said that the only expenses that the City would recognize would be the expenses incurred by the City officials in connection with their project, and that they were under no obligation to pay the expenses of any of the Union Pacific officials or others whose expenses were advanced by the Union Pacific."—Skinner, R. 789. Even the Union Pacific does not contend that all of the so-called advances for preliminary expenses are to be repaid by the City. "That the verbal agreement with the City to repay certain advances did not include the $350 monthly payments to Fean and DeOreo."—Haugh, R. 1130. While this refers to another item of the advances, it illustrates the meaning of Mr. Skinner in saying that the City declined to repay the expenses of "others whose expenses were advanced by the Union Pacific."

[2] Stanley, R. 1051; Spencer to Haugh, Bockes and Ess, June 28, 1939, Ex. 10, p. 48, R. 1742-3.

[3] "The City would advance the money if it were available, but inasmuch as the arrangement is contingent upon going forward, it cannot advance the money until the plan is declared operative. The only one who can advance the money is the Union Pacific."—Jeffers to Charske, Feb. 19, 1938, Ex. 4, p. 21. R. 1568-70.

Mr. DeOreo, offered the free trip to the shippers, and one of its officials, Mr. Weedin, and one of its agents, Mr. DeOreo, were in charge of the party on the journey, which was thus under Union Pacific auspices from beginning to end. Under these circumstances, the mere possibility that the Union Pacific might later be reimbursed for what it spent is not enough to relieve it of responsibility for participating not only in offering but in giving this particular concession.

(2) *Free Advertising.*

The District Court found that free advertising was both offered and given to the produce dealers by the Union Pacific to induce them to move to the new terminal,[1] and this finding is fully supported by the evidence.

Mr. Stanley told the produce dealers when seeking to induce them to move that one of the attractive features of the new terminal would be advertising and radio programs which would be furnished them.[2] After the terminal was opened, the Union Pacific itself paid station KMBC $125.00 a week to broadcast the food program on which individual produce dealers were allowed to advertise the kind and quality of fruits and vegetables they had for sale at the time.[3] It also purchased and made a widespread distribution of twenty thousand copies of the rotogravure section of *The Packer*, a Kansas City trade paper, of December 2, 1939, just before the opening of the terminal, containing among other things photographs of many of the produce dealers who had consented to move, and pictures and detailed descriptions of their new places of business.[4]

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[1] Findings of Fact 19 and 20, R. 271-3.
[2] Zeigler, R. 459.
[3] Koerper, R. 688.
[4] Stanley, 1087.

2. *City Admittedly Participated in Offering or Giving Cash Bonuses.*

The District Court found that the City participated in offering cash payments or cash bonuses to shippers for the purpose of inducing them to move to the new terminal.[1] It specifically found that the City and its officials approved the plan devised by the Union Pacific for the cash concessions, and joined and cooperated with the Union Pacific in developing and putting the plan into effect.[2] So far as the City's part is concerned, the accuracy of this finding is admitted by the appellants, who, while insisting that the City's role was larger and more important than the court believed the evidence to indicate, freely admit the City did participate in offering the bonuses. The conclusive documentary evidence makes denial impossible.

3. *City Participated in Offering and Giving Rental Concessions.*

An important part of the appellants' argument is bottomed upon the assumption that no rental concessions were either offered or given by the Union Pacific or the City and that the lower court so found.[3] This is a complete misapprehension of the court's findings upon the subject. While the court held that the standard rates of rental prescribed by the City were not unduly low or unlawful, it, nevertheless, found that these standard rates were not observed and that free rents, reduced rents, and rental credits were offered or given shippers,[4] and the evidence fully supports the findings so made.

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[1] Findings of Fact 12 and 13, R. 263-6.

[2] Findings of Fact 12, R. 344-6.

[3] Appellants' brief, pp. 250, 255-260.

[4] Findings of Fact 19 and 20, R. 352-3. The District Court expressly found that the appellants had given rental concessions during the pendency of the suit in violation of the temporary restraining order. See Supplemental

The complaint alleged the giving of three specific kinds of rental inducements to the shippers: (1) free rent, (2) reduced rent, and (3) inadequate rent.[1]

The Union Pacific and the City fixed the standard rate of rental at $150 a month for each warehouse store unit and at $1.10 a square foot a year for office space.[2] But the form of agreement with the tenant provided that he should pay only one-third of this rental for the first three months, waiver of the other two-thirds being allowed as a partial offset "to cover certain moving expenses."[3] This is one form of "reduced rent" referred to by the court. Another form of reduced rent arose from agreements under which the tenant would be allowed to deduct a rental credit of a certain amount each month and pay the balance.[4]

The free rental was given in several ways. No charge was to be made from the time of moving in until some date to be specified as the time of official completion of the terminal.[5] In some special cases the free rent was to be continued for a number of months longer.[6] Some of the rental credits were to be applied so as to give free rental until exhausted.[7]

Findings of Fact, filed April 5, 1940, R. 286-8. These findings were the occasion for the strict provisions relative to rentals which the Court felt compelled to include in the preliminary injunction. R. 288, 290-91.

[1] Complaint, Section V, par. 1, R. 12.

[2] Sup. Finding of Fact, R. 286; Ex. 13, R. 1855, 1918, 1923, 1924, Ex. 229, R. 3047.

[3] In a speech made by Mr. Haugh to the Citizens Advisory Committee, December 11, 1940, he said, on this point:

"The Board of City Commissioners of the City of Kansas City, Kansas, preparatory to leasing the facilities in the produce terminal, adopted a form of lease for the produce dealers which provided, among other things, for a rental of $150.00 per month for each of the produce dealers' units with allowances during the first three months of the term of the lease by way of reduced rent to cover certain moving expenses." (R. 1947.)

[4] R. 27-70.

[5] Ex. 62-B, R. 2618.

[6] Haugh to Mayor McCombs, December 18, 1939, R. 1787.

[7] Ex. 14, R. 1949.

These plans for rental concessions were largely carried out. Up to the time the preliminary injunction was granted on April 10, 1940,[1] numerous defendant produce dealers who had been induced to move to the new terminal had not paid a single cent of rent.[2] Despite the more stringent provisions of the preliminary injunction which required the observance of the City's standard rates of rental, with proportionate abatement where facilities were incomplete, until the final disposition of the case in the District Court, free rentals continued to be given.[3] A little later the Union Pacific devised a subterfuge for the tenants to pay a maximum of 40 per cent of the standard rentals,[4] and at least one tenant paid on this basis.[5]

4. *Union Pacific Participated in Offering or Giving of Cash Bonuses and Rental Concessions.*

(1) *Cash Bonuses and Rental Concessions Were Negotiated by Union Pacific.*

The complaint in this case alleges that between January 1, 1937, and the date it was filed, the Union Pacific, the City and others, offered, gave and granted cash payments, free rentals, reduced rentals, and inadequate rentals, among other things.[6] In its answer the Union Pacific made a blanket denial of this allegation. In his opening statement at the trial counsel for the Union Pacific conceded that there would be evidence showing that one or more of the officers of the railroad served on a fact-finding committee,

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[1] R. 288.
[2] McIntyre, R. 951.
[3] Mallin, R. 1287-88.
[4] Mallin, R. 1286-87.
[5] Sarser, R. 1256.
[6] Complaint V, par. 1, R. 12.

duly appointed and authorized by the City, to inquire into the proposed concessions.[1]

Vice-President Haugh of the Union Pacific asserted on the stand that he had not heard anything about concessions until about the time the City appointed the Skinner-Schlup-Payne investigating committee of City officials on November 16, 1939.[2] He professed to be ignorant of the fact that Mr. Stanley, Executive Assistant of the Union Pacific at Kansas City, had been engaged in conferences with shippers about concessions before there was any pretense of the appointment of the later Stanley-Cooksey-Brown committee.[3] On direct examination Mr. Stanley said that the first time he learned any of the shippers were seeking the so-called adjustments was in October, 1939, when he was told by Mr. DeOreo.[4] On cross-examination he admitted that some of these discussions might have taken place in September, but he was positive none of them took place before that time.[5] He was equally positive that he did not notice any provisions for concessions in leases for space at the new terminal until October or November, 1939.[6] Mr. DeOreo likewise professed never to have heard any discussion about adjustments of any description until September, 1939.[7]

Despite all of these denials the District Court found that during the promotion of the terminal the Union Pacific devised a plan of offering and giving special inducements to shippers to move to the new terminal. As early as August 7, 1937, the court found, the Union Pacific contemplated

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[1] Opening statement by Mr. Maguire for the Union Pacific, p. 69, transcript of proceedings on preliminary injunction, Feb. 12, 1940. The latter transcript has been filed with the clerk of this court pursuant to stipulation of the parties. R. 1464-6.

[2] Haugh, R. 1117.

[3] Haugh, R. 1144-4.

[4] Stanley, R. 1048.

[5] Stanley, R. 1058, 1079.

[6] Stanley, R. 1182.

[7] DeOreo, R. 642.

the necessity of giving such inducements. By August, 1938, it had negotiated with shippers with respect to cash payments and other inducements. Among the inducements which the railroad offered at one time or another were cash payments, free rentals, and reduced rentals.[1]

Since some of the offers of concessions were made by DeOreo and Fean—especially the former—it is important to note that the court found that during this entire period the Union Pacific conspired with these men and others to give illegal concessions including offers, agreements, payments, and gifts of free rentals, reduced rentals, cash payments, and rental credits, to induce the shippers to move to the new terminal.[2] This is equivalent to holding that DeOreo and Fean were the agents of the Union Pacific during the whole period since those engaged in a conspiracy are the agents of each other in carrying out the common design.[3] Section 1 of the Elkins Act specifically provides that the acts of any officer, agent, or other person acting for or employed by any common carrier, acting within the scope of his employment, shall in every case also be deemed to be the act of the common carrier or shipper.[4] By statute the Union Pacific is thus made responsible for any concessions offered or given by any officer, agent, or other person acting for it. The court specifically found that from November, 1938, to December 29, 1939, DeOreo and Fean were agents of of the Union Pacific.[5] They were on the pay

[1] Findings of Fact 19, 20, R. 351-4.

[2] Finding of Fact 20, R. 352-4. See also Findings of Fact 18 and 19, R. 350-2.

[3] *Hitchman Coal & Coke Company* v. *Mitchell* (1917), 245 U. S. 229, 249, 250.

[4] Section 1 of the Elkins Act, 49 U. S. C. 41 (1). This provision reads as follows:

"In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, or shipper, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or shipper as well as that of the person."

[5] Finding of Fact 18, R. 350-51.

roll of a Union Pacific subsidiary during the latter period.

There is a great body of evidence—much of it in no way mentioned by the appellants—which fully sustains the findings of the trial court on this point. There is ample evidence to show not only that DeOreo and Fean acted in concert with the Union Pacific but were also its agents, or persons acting for it, from the very first.

On January 4, 1937, immediately after their arrival in Kansas City, Stanley quoted DeOreo as saying: "He would not consult or talk with anyone else in Kansas City until he knew whether or not it was possible to work out a deal with the Union Pacific."[1] Mr. DeOreo did not find it necessary to negotiate with competing interests, and it is clear that some sort of a deal was worked out with the Union Pacific long before DeOreo and Fean were placed on the payroll of a subsidiary company in November, 1938. There was no written agreement. People engaged in underground activities prefer to avoid leaving such traces behind. Not long after Mr. Stanley reported that Fean and DeOreo, on account of their acquaintanceship with the characteristics of those engaged in the produce business, were as good as could be obtained for "a deal of this character."[2]

Mr. DeOreo says that for the first few months he was in Kansas City he frequently conferred with Mr. Stanley about the project—sometimes as often as every day. Mr. Stanley drew for him a petition in favor of the new terminal, to which he obtained signatures of produce dealers. He says he asked Mr. Stanley to do so because "He did not know any one but Stanley to talk to."[3] When a trade paper requested an interview with DeOreo about the promotion, Stanley drafted a press release for him.[4]

[1] Stanley to Haugh, Jan. 4, 1937, Ex. 14, p. 2, R. 1964-5.
[2] Stanley to Haugh, May 5, 1937, Ex. 2, p. 45, R. 1517-18.
[3] DeOreo, R. 622; Stanley to Haugh, June 30, 1937, Ex. 3, p. 2, R. 1535.
[4] Stanley to Haugh, June 20, 1937, Ex. 3, p. 2, R. 1535.

At every turn DeOreo depended on Stanley for guidance and assistance. Both he and Fean reported regularly to Stanley and worked in close conjunction with him. DeOreo had his headquarters in Stanley's office and used his clerks and stenographers.[1]

Forms of leases for quarters at the new terminal were drawn up by Union Pacific attorneys, approved by the City, with perhaps some modifications, and placed in the hands of DeOreo and Fean who set out to secure signatures of prospective tenants. Mr. Stanley gave the blank forms to DeOreo and Fean, and where leases were executed the papers were turned over to him.[2] The campaign for tenants was from the very first under the direction of the Union Pacific.[3]

Early in 1938, after it had been determined that the City would not only own but operate the facilities south of Jersey Creek, the Union Pacific suggested that the City employ DeOreo and Fean as leasing agents.[4] Some difficulty was encountered. The City officials, being hesitant and very cautious, decided to appoint a citizens' advisory committee to investigate and report on the subject.[5] Vice-President Haugh and Executive Assistant Stanley attended the meeting of the Commissioners at which the committee was selected, and Mr. Haugh says that "we" exercised great care to select only citizens who could be relied on as favorable.[6] The advisory committee, naturally enough in view

[1] DeOreo, R. 1177-80.

[2] DeOreo, R. 622; Fean, R. 575-6; Ex. 9, R. 1704-5, 1708.

[3] As early as December 16, 1937, Mr. Haugh wrote to Mr. Mitchell, "We are working on the proposition of getting the dealers from the old market. * * *" R. 1516.

[4] Haugh to Jeffers, Feb. 4, 1938, Ex. 28, R. 2183; DeOreo, R. 636; Stanley, R. 1031, 1063; Ex. 28, R. 2183; Ex. 4, R. 1509. See also Opinion Below, R. 244; Stanley to Haugh, May 5, 1937, Ex. 2, p. 45, R. 1517-18.

[5] Finding of Fact 14, R. 347-8.

[6] Haugh, R. 1103-4. Mr. Haugh wrote Mr. Jeffers February 4, 1938: "I * * * had several meetings * * * with the city commissioners. * * * They will have a formal meeting either Tuesday or Thursday * * *

of the manner of its selection, reported favorably, and the City entered into an agreement.[1]

The Union Pacific advanced to Fean and DeOreo each $300.00 a month as a so-called conditional loan from April to August, 1938, inclusive.[2] During the last two and a half months of this period, Fean and DeOreo were under contract with the City as leasing agents.

The rental agency contract of Messrs. Fean and DeOreo, with the City was cancelled on October 7, 1938, by mutual agreement. The Public Works Administration objected to the large commissions which the contract provided for the services of Messrs. DeOreo and Fean and made its cancellation a condition of a grant of Federal funds. The agreement of DeOreo and Fean to the cancellation was given reluctantly and only after pressure had been applied by the Union Pacific and the City. Mr. Ulmann, who participated in the negotiations for cancellation as attorney for Fean and DeOreo, testified that Stanley promised his clients $25,000 within forty-eight hours, as well as further compensation later on, as a consideration for cancellation.[3] The

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"At the same meeting, the commission will jointly appoint a citizens' advisory committee of nine. This committee will not have any authority, but will be one to engender public interest and good-will. It will bring in a recommendation relative to the proposition as a whole and will particularly recommend agents to be employed to secure leases for the market buildings. * * *

"We spent a great deal of time on the personnel of the committee so that it would be a committee that we were sure would be favorable, * * * Mr. Breidenthal will be chairman of the committee."—R. 2183.

On the witness stand, Mr. Haugh denied that he participated in the deliberations of the commissioners or made any suggestions as to the membership of the committee. R. 1103-4. The account he wrote before the suit is, however, the more trustworthy evidence.

[1] Under this agreement the rental agents were to receive a commission of five per cent of the rentals for the first year, four per cent for each of the succeeding nine years, and two and one-half per cent during each of the succeeding twenty years. The total commissions under the contract were estimated at between $200,000 and $300,000 (Finding of Fact 14, R. 347-8).

[2] Ex. 31, R. 2234-A; Fean, R. 582-3; DeOreo, R. 625-6.

[3] Ulmann, R. 639-45; Ex. 5, R. 1624-5.

payment, however, was not made by the Union Pacific and Ulmann, acting with authority of his clients, threatened to sue the railroad. A committee of the Chamber of Commerce of Kansas City, Kansas, meeting with the representative of the Union Pacific in attendance, offered DeOreo and Fean $35,000 in full payment for their services up to the time of the cancellation of their contract, but they refused.[1] Mr. Ulmann, with the consent of DeOreo and Fean, negotiated with interests in Kansas City, Missouri, opposing the project to secure a lump sum payment to DeOreo and Fean in return for their withdrawal from the project,[2] but nothing came of this, the Missouri negotiators making public a dictaphone record of the conference.[3]

A little later, first DeOreo and then Fean went back to the Union Pacific saying that they would continue as leasing agents for the new terminal if money could be secured for them. Upon the recommendation of Mr. Stanley, the Union Pacific arranged to have one of its subsidiaries, the Kansas City Industrial Land Company, pay DeOreo and Fean $350 a month each for going ahead with their leasing activities. Payments began in November, 1938, and continued through the trial. Although Haugh, Stanley, DeOreo, and Fean testified that these monthly payments were conditional loans, it is admitted that no notes were given,[4] and that nothing is to be repaid unless DeOreo and Fean collect from the City for services rendered prior to the cancellation of the leasing agency contract.[5] In asking the General Auditor of the Land Company for each voucher covering the monthly payments, Haugh stated that it was for services performed during the month.[6] A note on one

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[1] Ulmann to Stanley, Nov. 29, 1938, Ex. 13, R. 1886-7; Ex. 98, R. 2042-4.
[2] DeOreo, 627-28.
[3] DeOreo, R. 628.
[4] Haugh, R. 1128.
[5] Boyd, R. 447; Haugh, R. 1105.
[6] R. 2115-28.

memorandum making such a request states, "Mr. Haugh says this amt. not recollectible."[1] Stanley, in asking Haugh to send checks to the agents for December, 1939, remarked cryptically, "They are both working."[2]

After this arrangement had been made, DeOreo and Fean went back to work soliciting tenants, securing wherever possible signatures to a new printed form of lease just adopted,[3] working as before under the supervision of Stanley and reporting directly to him.[4]

From March to August, 1938, Mr. DeOreo spent most of his time in Denver working under the supervision of Mr. Haugh in soliciting tenants for a new food terminal built there by the Union Pacific without outside participation. DeOreo, who in his own words had been "out on the street in the preceding fall", received $22,000 from the Union Pacific, ostensibly for the five months' work in Denver.[5]

While Mr. DeOreo was engaged in securing tenants for the wholesale warehouses, Mr. Fean was busily engaged in securing tenants for the farmers' wholesale market— another one of the facilities of the terminal. He also assisted to some extent in securing tenants for the warehouses. His activities were under the general supervision of Mr. Stanley

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[1] R. 2116.

[2] "It will be advisable to send Fean & DeOreo a check for $350 each 'per services rendered in Dec. 1938.' They are both working."—R. 2117.

[3] Stanley to Haugh, December 31, 1938, Exhibit 9, p. 20, R. —.

[4] "Mr. DeOreo called at the office this morning and left three additional leases executed on the new form. This makes a total of fourteen units that have been leased since yesterday morning when the printed form became available."—Stanley to Haugh, December 31, 1938, Exhibit 9, p. 20, R. —.

"Mr. DeOreo brought in three or four new leases today. He is working hard and apparently doing a very good job."—Stanley to Haugh, January 4, 1939, Exhibit 9, p. 24, R. 1704.

"DeOreo brought in four more executed leases, bringing the total up to 38 units signed by 30 different merchants. Fean is also making some progress on farmers leases and claims to have over 300 executed leases. I gave DeOreo and Fean each a check for $350 for services performed in December."—Stanley to Haugh, January 5, 1939, Exhibit 9, p. 26, R. 1705.

[5] Finding of Fact 14, R. 348-9; Ex. 46, R. 2348; DeOreo, R. 630.

and he was assisted by the Union Pacific officials. As part of the campaign to secure the support of the farmers, Mr. Fean, with funds provided by the Union Pacific, organized and operated the Heart of America Growers Association, an organization of the tenants of the farmers' market.[1]

With this background of the general relationship of Fean and DeOreo to the Union Pacific, it will be easier to understand their several roles in offering or giving the concessions.

The first definitely traced offers of concessions were made by DeOreo and Fean. They had had experience as promoters or leasing agents of food terminals for railroads in Buffalo, Cleveland, and other places.[2] In the Buffalo promotion in which DeOreo and Fean had been engaged it was known that concessions had been paid to induce merchants to move to the new terminal.[3]

Early in 1937, DeOreo and Fean organized a merchants' committee composed of five wholesale produce dealers to assist in the promotion, verbally promising them five thousand dollars each in cash and a share in the restaurants and other concessions at the terminal. DeOreo promised one of the committee, Jack DeFeo, a job as manager of the market.[4] The contracts for compensating the members of the committee were later put in writing, and they recite that the money is for services on the committee "and the occupancy • • • of said food terminal" as tenants of the produce buildings.[5]

Stanley says that he knew nothing of these contracts to pay the members of the committee for moving to the new

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[1] Finding of Fact 17, R. 350.

[2] Fean, R. 570; DeOreo, R. 613-14.

[3] Reed to Mitchell, Aug. 7, 1937, R. 1090. Haugh admits knowing this, R. 1144.

[4] DeOreo, R. 619-21.

[5] Finding of Fact 19, R. 351-2; DeOreo, R. 621; Yukon, R. 593-5; Ex. 86, R. 2757; Ex. 89, R. 2759; Ex. 90, R. 2760.

terminal until the summer of 1939 when he read Jasper DeMarea's contract.[1] But Stanley frequently attended the meetings of the merchants' committee,[2] including a meeting in 1939 where the cash adjustments or bonus and rental credits were discussed.[3] He promised one of the members of the committee, Simon Yukon, that he would see to it that DeOreo paid the five thousand dollars called for by his contract,[4] at the same time indicating that all of the members of the merchants' committee would be similarly treated.

After the merchants' committee had been organized and promised compensation, Mr. Earle G. Reed, Agricultural Agent of the Union Pacific, was sent to Kansas City to make a survey of the terminal project. He wrote that the produce dealers "will go where the larger volume is handled, the costs are lower, and the facilities are better, or if they are paid for going.[5] * * * The railroad should be prepared to and might have to buy unwanted properties in order to make certain and secure the investment in the new food terminal tracks and facilities."[6] Although Stanley denied on the witness stand any recollection of having noticed this

[1] Stanley, R. 1063.

[2] DeOreo, R. 631; Yukon, R. 595-9. One meeting was attended by a group of higher Union Pacific officials, including Mr. Carl Gray, then President, Mr. W. M. Jeffers, then Vice-President and later President, and Vice-President Haugh. Haugh, R. 1102-3.

[3] Yukon, R. 599.

[4] "Q. (By Mr. Costolow): Did Mr. Stanley at any time in his conversation before you were thrown out over there, did he at any time, mention the matter of this $5,000, the five thousand contract?

"A. He knew about it, yes.

"Q. What did he say to you with reference to it?

"A. Well, he said he was going to see that Joe would pay us.

"Q. Did he say anything else?

"A. No, but that he thought we would be taken care of on it, on our contract."—Yukon, R. 605.

The conversation described by Yukon took place in December, 1939, but it will be noted that the witness indicated that Stanley had previously known about the agreements with the merchants' committee.

[5] Ex. 14, p. 30, Earle G. Reed, R. 1989-90.

[6] Reed, R. 1991.

part of Reed's report, a copy was nevertheless sent to him.[1] His denial is also incredible because, as Reed said, Stanley had full command of everything about the project, had "every detail, fact and minute information at his command,"[2] and it is past belief that he overlooked a matter of great importance such as this. Vice-President Haugh was almost equally conversant with the situation, being kept fully informed of the events by Stanley who says that he told his superior everything.

Charges were made by interests opposing the terminal project that the produce dealers were being offered money and other things of value as an inducement to persuade them to sign leases. M. R. Bevington, a special agent of the division of investigation of the Public Works Administration, made inquiries on this subject as a part of his investigation in August and September, 1938, of the City's application for a loan of Federal funds.[3] He interviewed DeOreo, who said that the leases thus far signed were in Mr. Stanley's hand.[4] He interviewed some of the produce dealers. Jack DeFeo, one of them and a member of the merchants committee, stated that he had signed a lease and that as consideration for signing it DeOreo offered him the position of market manager at $5,000 a year, and that after a free period, which had not yet been fixed, he would secure rental of space for $100 a month that others would have to pay $150 for.[5]

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[1] The report from which the quotation is taken is entitled "Summarizing the Produce Terminal and Market Situation in Greater Kansas City." It was an attachment to Reed's letter of August 7, 1937, to R. R. Mitchell, Freight Traffic Manager of the Union Pacific. R. 1985.

[2] "Our Mr. Stanley and his associates are certainly handling the matter in a most capable, careful and complete manner. Mr. Stanley has every detail, fact and minute information at his command."—Reed to Mitchell, Aug. 7, 1937, R. 1981, 1985.

[3] Bevington, R. 1166.

[4] Bevington, R. 1169.

[5] Bevington, R. 1171-2.

Another member of the merchants committee, Ike Sarser, declared that while the lease he had signed called for rent of $150 a month, it was, nevertheless, subject to a condition that he would not be required to pay any rent.[1]

Thomas Sheahan, an officer of Garrett Holmes & Company, produce dealers, said when interviewed "that representations were made to him that in the event of his taking space in the Kansas City, Kansas, market the Union Pacific would, on a valuation of $20,000 as to the present worth of his present lease and improvements thereon, give him a rent credit in said sum on a thirty year lease."[2] Mr. Sheahan, it is true, denied making any such admission but admitted the interview with Bevington.[3] He says that a year later, in August, 1939, he went to Stanley's office in response to an invitation, and Stanley then inquired about the extent to which his firm was obligated in Kansas City, Missouri, and to which he gave an estimated figure of $20,000 in reply.[4]

In face of this conflicting testimony, the trial court, with a great amount of other evidence also before it, found as a fact that by August, 1938, the Union Pacific, through its officers and agents, had negotiated with produce dealers with respect to cash payments and other inducements to move to the new terminal.[5] It cannot be said that this finding, based on conflicting evidence, is clearly erroneous, and even if this Court were called upon to weigh the evidence it should hold the same way.

Mr. DeOreo said that he thought he told Vice-President Haugh of the Union Pacific about rental adjustments and cash bonuses at the time he arranged for the so-called "conditional loan" of $350.00 a month for services rendered

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[1] Bevington, R. 1173-4.
[2] Bevington, R. 1175.
[3] Sheahan, R. 1197-8.
[4] Sheahan, R. 465.
[5] Finding of Fact 19, R. 351-2.

for the Union Pacific's subsidiary.[1] This admission, made in the course of cross-examination, would place the conference with Mr. Haugh in December, 1938, from nine to eleven months previous to the time when Mr. Haugh and Mr. Stanley say they acquired their first knowledge of the concessions.

On June 28, 1939, the Western General Counsel of the Union Pacific, after receiving a telephone call, telegraphed Mr. Haugh a cryptic message. "If city in Kansas," he said, "can lawfully commit itself to railroad the latter should be safe in advancing funds to city, and city will then have its own relation with its prospective tenants."[2]

Stanley says that the money was to be used to rent buildings for the use of produce dealers who were threatened with eviction from the municipal market of Kansas City, Missouri, unless they would consent to sign long-term leases, interfering with their plans to move a few months later to the new Kansas terminal upon its completion, but that it proved unnecessary to do anything of the sort and the matter was dropped.[3] On July 1 or July 3, Haugh and Stanley sought the approval of the City Commissioners for a group of leases which had already been signed by various prospective tenants.[4] Some were approved as he suggested; others,

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[1] DeBoos, R. 635.

[2] This telegram reads in full as follows:

"TWB is telephoning you regarding problem at KC. If city in Kansas can lawfully commit itself to railroad the latter should be safe in advancing funds to city, and city will then have its own relation with its prospective tenants.

"Re[illegible] the leading cases involving the Elkins Act are 241 Fed. 25, wherein court refuses preliminary QT. The cases show that it is the law that any preliminary inducement held out to a shipper to procure his business over a particular railroad is or may be a rebate or concession within the prohibition of the Elkins Act UNQT. See also 226 Fed. 713 and 236 U. S. 256 and 283 U. S. 351 and 1933 A 709 and 277 Pa. 235. Orig. H. N. Ess Cy. TWB. JLH. ASB."—A. C. Spencer to Ess, Boehm, and Haugh, June 28, 1939, R. 1742-3.

[3] Stanley, R. 2355-7.

[4] "We had previously held up execution by Kansas City, Kansas, of lease which had been signed by jobbers. We are today, however, having them

however, were passed over because they contained various conditions or stipulations inserted for the purpose of changing the terms of the standard form of lease.[1] At the trial the appellants were asked to produce the leases thus passed over, but they said that the papers could not be located.[2]

Special terms inserted in so-called conditional leases secured after July 1, 1939, however, in a number of instances, dealt with the subject of concessions to the lessee, usually in the form of a condition that the lease should be null and void unless the lessor should make cash settlement with the lessee for damages on account of abandonment of leaseholds and equipment left behind in Missouri. Mr. Stanley attempted to avoid the force of these facts by claiming that he did not notice the provisions for concessions in the leases until October or November, 1939,[3] but his explanation is incredible in view of his direction of the leasing campaign and in view of the fact that these and all other leases were submitted to him after execution.

These so-called conditional leases refute the testimony of Stanley and DeOreo to the effect that they were not engaged in negotiations for concessions until September or October, 1939. These documents show that they were so engaged, at least as early as August of that year.

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execute and copies delivered to each jobber tenant."—Haugh to Jeffers, June 30, 1939, R. 1744.

Haugh says he was present at this meeting. R. 1117. Stanley professed not to recall being present at this meeting, but there is every reason to believe that Stanley was also present in an effort to have the City complete the execution of the leases pursuant to the policy explained by Mr. Haugh to Mr. Jeffers. Commissioner Blake testified that Stanley was in fact present, and there is every reason to believe that his statement is correct (Blake, R. 1018, 1176). It is corroborated by the statement of Mr. Payne, the City Clerk, that "the first leases were brought to the meeting of the Board of Commissioners on July 1 by Mr. Stanley of the Union Pacific * * *."—R. 674.

[1] Blake, R. 1018, 1176; Skinner, R. 796-8, 1182-3; Exhibit 104, R. 2837-50; Payne, R. 681-2.

[2] Blake, R. 1176; Skinner, R. 782-3.

[3] Stanley, R. 1181-2.

The first of the so-called conditional leases in evidence are two dated August 17, 1939, one of which is a lease to the Litman Produce Company,[1] and the other to Joseph L. Robinson of the National Produce Company.[2] These are followed by one to Winick Brothers, August 18, 1939;[3] one to H. Widlansky of the Quality Banana Company, August 28, 1939;[4] and another to H. Junsberg & Son Produce Co., Inc., September 29, 1939.[5]

DeOreo witnessed these leases and he admits negotiating them. The conditions with respect to payment of concessions were typewritten on blanks in the printed form, in the Union Pacific office by its clerks and stenographers and the executed leases were left with Stanley.[6] DeOreo says that Stanley was in his office when the Widlansky lease was prepared.[7]

Mr. Stanley admits that previous to the appointment of the City's Investigating Committee he conferred with some of these men regarding concessions for moving, including Widlansky,[8] Winick Brothers,[9] and Litman.[10] The significance of this, of course, is that it places the negotiations in closer proximity to the telegraphic legal advice from Spencer to Haugh and also indicates that Stanley and DeOreo were negotiating about concessions and inserting the conditions respecting them in leases at least two months prior to the first official action taken by the City on the subject.

Harry Robinson, another member of the Merchants Committee, says that "some time way before" November, 1939,

[1] Ex. 104, R. 2844; DeOreo, R. 1179.
[2] Ex. 104, R. 2844; DeOreo, R. 1177-8.
[3] Ex. 104, R. 2843; DeOreo, R. 1179-80.
[4] Ex. 104, R. 2842; DeOreo, R. 1177.
[5] Ex. 104, R. 2845; DeOreo, R. 1178.
[6] DeOreo, R. 1176-80.
[7] DeOreo, R. 1178.
[8] Stanley, R. 1069-70.
[9] Stanley, R. 1070.
[10] Stanley, R. 1070.

he told DeOreo he would require some kind of adjustment before he could move to the Kansas terminal. DeOreo inquired about his investment in his garage and banana rooms.[1]

Ira D. Burns, Secretary of the Mallin Produce Company, conducted all of his negotiations with respect to concessions with Mr. Stanley, having no conferences with either DeOreo or Fean or any of the City officials. As a result of talks about concessions some weeks before,[2] Mr. Mallin, President of the Company, referred Mr. Stanley to Mr. Burns, who, besides being Secretary was also attorney for the firm, and Mr. Burns and Mr. Stanley held a conference in the latter part of October or the first part of November, 1939.[3] Previously, Mr. Mallin had submitted to Mr. Burns a so-called tentative or conditional lease for space in the new Kansas terminal, containing a typewritten clause providing that if executed the lease was not to become effective until satisfactory financial arrangements were made between lessor and lessee.[4] Mr. Burns says that payment of concessions for moving to the new terminal was a common subject of conversation around the Missouri market, and that Stanley at the conference spoke of having talked with other produce merchants.[5] Mr. Burns questioned the transaction, asking Stanley whether the $15,000 allowance or bonus which Stanley mentioned was to come from the Union Pacific, whether the City had authority to make the payment, and whether it would involve any violation of the Elkins Act.[6] Mr. Stanley was still negotiating with Mr. Burns about the payment at the time the present suit was brought.[7]

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[1] Robinson, R. 561-3.
[2] Burns, R. 452.
[3] Burns, R. 448-9, 452.
[4] Burns, R. 449.
[5] Burns, R. 453.
[6] Burns, R. 449-50.
[7] Burns, R. 450.

On October 24, 1939, Mr. Stanley made some significant comments in a letter to former Commissioner Schaible, who was applying to him for a position as manager of the market facilities at the terminal. He said: "We have had splendid success in securing leases. Three of the main buildings have been completely leased. * * *" The big job is to move the trade and to do it at one time. If possible, I am anxious to fix the date of opening for Monday, December 4th * * * It is a very delicate proposition to get the merchants to agree to move at one time and we have much to do in that direction."[1]

About November 16, 1939— or possibly before that time— Mr. Stanley laid the matter of concession payments before the Board of City Commissioners.[2] On that date the City appointed a committee to investigate and report, consisting of Mr. Skinner, the City Attorney, Mr. Schlup, the City Engineer, and Mr. Payne, the City Clerk. On November 19, Mr. Haugh, then en route to California by train, wired the General Solicitor of the railroad at Omaha, asking him to send Mr. Walter Rouse, one of the Union Pacific attorneys, to Kansas City, so that he might "continue there helping the adjustment committee" and handling other terminal matters.[3] When the adjustment committee began its work, Mr. Rouse attended its sessions and participated in conferences with produce dealers.[4] The prospective tenants were invited to meet with the committee, and were interviewed one by one. Without exception, they wanted large cash payments or rental credits in consideration of moving to the Kansas City Food Terminal.[5] Those interviewed made

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[1] Stanley to Schaible, October 24, 1939, R. 1943-4.

[2] Skinner, R. 1048; McCombs, R. 901.

[3] Haugh to Bockes, November 19, 1939, Exhibit 12, R. 1765.

[4] Payne, R. 675-6. According to the City Attorney, Mr. Rouse "had been invited to sit in with the Committee as a representative of the bondholder"— that is, the Union Pacific. Skinner, R. 802.

[5] Payne, R. 675-82.

frequent statements to the effect that they had consulted with Mr. Stanley and Mr. DeOreo.[1] Several of them said that Mr. DeOreo had made promises to them.[2] The adjustment committee made first a verbal and then a written report to the Commissioners.[3] The committee confined itself to reporting the facts developed in the interviews, making no recommendations, but its tone was somewhat critical.[4] Mr. Payne declared that he at no time made any recommendation for the payment of concessions, saying that he didn't think the thing made sense and that Commissioner Darby was inclined to agree with him.[5] After reporting, the Committee functioned no further.[6]

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[1] Preliminary report of the Committee, November 30, 1939, Exhibit 105, R. 2853. The report states in part:

"Each of the gentlemen contacted made frequent statements to the effect that they had consulted with Mr. Guy E. Stanley and Mr. Joseph DeOreo. Mr. Joseph DeOreo accompanied Mr. Jack DeFeo to the City Hall, came into the Committee room, but did not remain in the Committee room during the Committee's discussion with Mr. DeFeo.

"Your Committee made a number of notes during each of these interviews, and all sessions of the Committee were attended by the full Committee, and in the presence of Mr. Walter Rouse, General Attorney for the Union Pacific Railroad Company, who participated in the discussion, and likewise made notes."—R. 2853.

[2] The testimony of Mr. Payne on this point is as follows:

Q. Now, with respect to Mr. Litman, did he say that he had previously talked with anyone else concerning any payments that might be made to cover his moving expenses or any bonus that he might be given?

"A. Well, I would hesitate to quote any particular person saying anything. Several of them said that Joe DeOreo had made promises to them. I never heard Mr. Fean's name mentioned in connection with that. It was always Joe DeOreo.

"Q. Were there any other names mentioned?

"A. One man said that he had talked to Mr. Stanley." R. 679.

[3] Payne, R. 682; Exhibit 105, R. 2853. Mr. Skinner wrote the formal report, Payne, R. 682.

[4] Exhibit 105, R. 2851-4.

[5] Mr. Payne's testimony on this point is in part as follows:

"* * * the first time he ever heard that anything was expected by lessees beyond that was shown on the face of the leases was when the committee of which he was a member was appointed on November 16; that he never recommended individually or in his official capacity as City Clerk that any conces-

[6] Schlup, R. 1017.

Mr. Stanley, who was present when the Committee reported to the Board of Commissioners, immediately sought to arrange to have the matter of concessions referred to a more friendly group.[1] He suggested that two brokers, Cooksey and Brown, who knew the produce dealers, could work out better agreements with them and secure a decrease in their demands.[2] The Board agreed to the suggestion.[3] Commissioner Darby suggested that the negotiations be handled jointly by the City's investigating Committee, composed of Messrs. Skinner, Schlup, and Payne, and the Stanley-Cooksey-Brown committee. Mr. Skinner had other business, and the meeting broke up with the idea that Mr. Stanley would call Mr. Schlup and Mr. Payne whenever it was necessary to

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sions be made; that he never asked any member of the committee to make such a recommendation, and that the members of the committee individually and collectively told the prospective lessees that the City had no money with which to pay; that he did not recommend to the Board of City Commissioners the payment of any concessions or adjustments for moving expenses; that his committee made no recommendations to the Board of City Commissioners other than the report referred to, but that he had made a verbal report to Mr. Darby, one of the Commissioners, that he didn't think the thing made sense and that he didn't know what could be done about it, and that Mr. Darby was inclined to agree with him, that is, that he knew there was no money in the Treasury to pay claims with. That in conversation with Mr. Darby he had advised the latter that in his opini n the opinion of the Attorney General of the State of Kansas should be secured before any move was made in the matter and that Mr. Darby agreed."—R. 685-6.

[1] Mr. Payne's testimony is in part as follows:

"* * * at the meeting of the Board of City Commissioners when the committtee appointed to investigate leases obtained from produce dealers made their report when Mr. Stanley was present, the substance of the conversations was that the committee had done a pretty fair job of investigating what the looked-for concessions in connection with the leases were, but that the committee had gone about as far as it could and possibly some other individuals who knew the prospective lessees better and who had their confidence could bring them off their high horse and work out better agreements than the committee had reported to the Board would have to be worked out, and that this suggestion, he thought, came from Mr. Stanley; * * *"—R. 685.

[2] Payne, R. 684-5; Stanley, R. 1048-9.

[3] Darby, R. 967; Stanley, R. 1050.

have a conference with them, but they were never called.[1] The explanation is quite probably in the suggestion by Mr. Stanley, quoting both Mr. Cooksey and Mr. Brown to the effect that the produce dealers did not like to talk to City officials.[2]

After getting rid of the members of the City Committee with their strict and impractical notions, Mr. Stanley then proceeded with Messrs. Cooksey and Brown to interview a large number of produce dealers, including for the most part those with whom Stanley and DeOreo had previously conferred on the same subject.[3] These conferences with the produce dealers began Friday, December 1, 1939, and were ended by December 7, when the report was submitted to the City Commissioners.[4] What the Committee did was to arrive at some understanding with the shippers as to the minimum concessions for which they would move to the new terminal, the shippers being told that their propositions would be submitted to the City for its approval or disapproval and that the concessions, if any, would be paid by the City.[5] After December 7, Mr. Stanley continued his negotiations with various produce dealers. Some of them had not been interviewed by the Stanley, Cooksey, and Brown committee.[6] Most of them moved to the new terminal

[1] Payne, R. 684-5; Stanley, R. 1050.

[2] "That Mr. Darby then said he thought there should be a representative of the City present, and suggested Mr. Payne. That he told him he had no objection to Mr. Payne going, and that Mr. Brown and Mr. Cooksey had talked about that, saying that these people didn't like to talk to City officials, and that they knew them better, * * *"—Stanley, R. 1050.

[3] Those interviewed included Louis Mallin of Mallin Produce Company (Stanley, R. 1051); Mr. Litman of Litman Produce Company, Mr. Ziegler, Mr. Helm, Winnick Brothers, and Mr. Sarser (Stanley, R. 1052); Mr. Feinberg, Mr. Winer, Mr. D'Angelo, and Mr. Baum (Stanley, R. 1080); Mr. Rosensweig (Stanley, R. 1081); Mr. Sheahan, Mr. Garrett, Mr. Holmes, and Mr. Obermann, members of the firm of Garrett-Holmes and Company. (Stanley, R. 1075).

[4] Stanley, R. 1048-53, 1075.

[5] Stanley, R. 1051.

[6] Burns, R. 449-51; Marshall, of O. C. Evans Company, R. 713-18.

on the strength of their conferences with Stanley's committee without waiting for payment, which they evidently considered a mere formality.[1] Mr. Stanley's negotiations with Burns and Marshall were still in progress when this suit was brought.[2]

The role played by Mr. Stanley with respect to the management of the terminal, as well as the payment of concessions, is rather well illustrated by his dealings with Simon Yukon, who was a member of the merchants committee and who, like the other members, had been promised $5,000 in consideration of service on the Committee and moving to the new terminal.[3] Yukon was Secretary of L. Yukon & Sons Produce Company, a corporation in which the other officers were his father and brother.[4] Although he himself was already committed to move to the new terminal, he could not persuade controlling stockholders to transfer the company's business. He was therefore one of those called to the meeting of the Stanley, Cooksey, and Brown committee. Mr. Stanley asked him how much money the firm wanted for moving; and when he said he thought he could get them to move for around $20,000 Mr. Stanley replied that that was absolutely out of reason.[5] In the next day or two, Mr. Yukon had another talk with Mr. Stanley, who wanted to know whether he had been able to induce his firm to move, receiving a negative reply. Mr. Stanley said the Yukons should have more conferences and let him know what they could do.[6] In the meantime, Simon Yukon, leaving his firm on the Missouri side, had moved to the new terminal, setting up a wholesale produce business of his own in a unit

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[1] Sheahan, R. 473; Payne, R. 668; Ex. 102, R. 2333.
[2] Burns, R. 450; Marshall, R. 718.
[3] Finding of Fact 19, R. 351-2.
[4] Separate answer of defendant Simon Yukon, R. 103-5; separate answer of L. Yukon & Sons Produce Company, R. 105-8; Yukon, R. 593, 601-2.
[5] Yukon, R. 600-601.
[6] Yukon, R. 601.

which he had leased.[1] A week later, Stanley came to the office of the Yukon company in Missouri saying that he would like to get the firm to move to the new Kansas terminal. Yukon's brother told him that he wasn't interested in moving and that it would take about $50,000 for him to move. Mr. Stanley replied that that was completely out of reason, but that he thought he could get the Committee to pay $20,000. The Yukons rejoined they weren't interested in such an amount.[2] A day or two later, Mr. Stanley called Simon Yukon to his office in the Railway Exchange, asking why he couldn't get the whole Yukon firm to move. Yukon replied that while at one time he probably could have persuaded them, the other stockholders had changed their minds and it would be impossible to persuade them to move, irrespective of any sum that might be offered. Stanley said that he was sorry, but that under such conditions Yukon would have to get out of the new terminal, claiming that the other members of the merchants committee strenuously objected to having the Yukon firm operate on both markets.[3] Yukon said he wasn't going to get out.[4] This conversation occurred on Saturday afternoon. On the following Monday morning, the lights were turned off in Yukon's wholesale store unit at the new terminal.[5] He complained to Mr. Stanley, Mr. Breidenthal, Mayor McCombs, and Mr. Skinner, but nothing was done about the lights.[6] About four or five days after the lights were turned off, Mr. Haugh and Mr. Stanley came to see him, the latter still inquiring regarding the prospect of getting the Yukon firm to move to the new terminal, but nothing was accom-

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[1] Yukon, R. 603.
[2] Yukon, R. 601-2.
[3] Yukon, R. 603.
[4] Yukon, R. 605.
[5] Yukon, R. 606.
[6] Yukon, R. 606.

plished.[1] Yukon says that he was finally "put out," "expelled," apparently meaning that he was forced out due to his inability to operate without electric service.[2]

Vice-President Haugh also played a part in the negotiations with the shippers, although he was by no means as active as Mr. Stanley. Returning from his trip to California, he arrived in Kansas City on November 28, 1939. Two days later, Mr. Weedin wrote to Mr. Robinson, Vice-President—Traffic, "Mr. Haugh and Mr. Stanley are very much occupied with last minute negotiations with members of the trade."[3] While Mr. Haugh denied the truth of this report of his activities, and denied that he went with Mr. Stanley to talk about the so-called adjustments, he admitted that he went with him to call on Mr. Marshall of O. C. Evans Company,[4] although he did not admit that he went with him to call on Mr. Yukon.[5] Yet despite these denials, Mr. Haugh, in reports to President Jeffers, indicated that he was intensively engaged in the activities in connection with the concessions, or "adjustments," as he called them. On December 6, 1939, he reported that "Mr. Stanley and I attended meeting with jobbers on new market held yesterday afternoon for purpose of consolidating sentiment for new terminal. It was very effective in that direction. They agreed that all premises they had formerly occupied on Missouri side should be vacated not later than Saturday. While not so stated at the meeting, in a number of cases this is contingent on cash adjustments being completed before that time. Situation looks better now." In the same message, he reported accord among the attorneys for the Union Pacific and the City regarding the legality of having the City pay the cash adjustments, fore-

[1] Yukon, R. 607-8.
[2] Yukon, R. 605-8.
[3] Weedin to Robinson, November 30, 1939, Exhibit 16, R. 2053.
[4] Haugh, R. 1142-3.
[5] Haugh, R. 1142-3; Yukon, R. 607-8.

cast the appointment of the Citizens Advisory Committee, and eventual approval of the plan to pay the adjustments. "We are endeavoring," he said, "to get this completed before Saturday."[1] On December 7, he reported a conference with the City Commissioners late the previous day; told of their employment of a Legal Advisory Committee; and forecast that "If legal opinion is favorable, matter will be progressed quickly.[2] On December 8, 1939, he reported that the Union Pacific attorneys, fresh from sitting in with the City's Legal Committee, advised that nothing unfavorable had been developed. "General situation," he said, "now appears more favorable than at any time as to allowing adjustments which are very important. We are working all possible to conclude adjustments before Saturday."[3] December 9, he reported that he had been asked—presumably as its proponent—"to present the proposal relative to adjustments" to the Citizens Advisory Committee. "It looks favorable," he said, "although it is taking longer than expected. * * * When we get this particular behind us, we can make better progress."[4]

On December 11, he addressed a joint meeting of the City Commissioners and the Citizens Advisory Committee, urging them to approve the payment of concessions. He warned that failure to take the suggested action would occasion the risk of losing "the prospective tenants, the loss of which will threaten the success of the project and thereby cause the City great loss and subject the Board of City Commissioners to severe criticism for failure to protect against that loss." He went on to say that when the terminal opened for business on December 4 "fourteen of the dealers occupying 23 units have partly moved from their

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[1] Haugh to Jeffers, Dec. 6, 1939, R. 1773-4.
[2] Haugh to Jeffers, Dec. 7, 1939, R. 1774.
[3] Haugh to Jeffers, December 8, 1939, R. 1775.
[4] Haugh to Jeffers, December 9, 1939, R. 1777.

old location to the new, leaving a part of their business in the old location pending adjustments to be made to cover cost to them by reason of the relinquishment of outstanding leases, equipment, fixtures, and other improvements to the leased premises and certain other definite items." He urgently recommended payment of these adjustments, saying "It is necessary to complete this move immediately or there is great danger of losing all of these tenants. They are importantly controlling. This adjustment must be made quickly or there is almost certain danger of a very great loss to the City by reason of tenants."[1]

December 12, he reported to the President of the Union Pacific concerning his speech before the Board of City Commissioners and the Citizens Advisory Committee, advocating that the City give the cash bonuses and rental credits. "I presented matter fully", he said, "and importance of it. * * * We still need opinion Attorney General."[2] On the same day he wrote Mr. Jeffers enclosing a newspaper attack on the commercial bribery program. "I expect this to be given very wide attention throughout the country," he said, "because of its very unusual nature. It is such an unusual transaction that it could not be handled otherwise than * * * entirely above board."[3]

On December 16, he reported trouble with the Attorney General, who, while friendly, was not "willing to take responsibility to issue opinion. * * *" A *quo warranto* proceeding in the Supreme Court of the State was necessary "to establish authorization of City to make adjustments. This is being developed in such way that motion will be filed Monday, heard Tuesday and decided Wednesday of

[1] Haugh's Memorandum Respecting Problems Confronting Board of City Commissioners of the City of Kansas City, Kansas, in Connection with the Establishment of the Produce Terminal on the Public Levee in the City of Kansas City, Kansas, December 9, 1939, R. 1946, 1950-51.

[2] Haugh to Jeffers, Dec. 12, 1939, R. 1780-81.

[3] Haugh to Jeffers, Dec. 12, 1939, R. 1781.

next week. Delay is aggravating but believe we can hold merchants until decision is rendered. It will be a greater protection."[1]

On December 18, he reported that the attorneys for the City and the Union Pacific were all at Topeka working on the *quo warranto* case. "Everything so far", he said, "is favorable. * * * Am working here until adjustments are decided."[2]

These reports of the Vice President to the President of the Union Pacific are very obviously not the accounts of a bystander—a witness on the side lines—but those of a man playing not only an active but a very prominent part in the events as they took place "working all possible to conclude adjustments" before a deadline he had set for himself, annoyed by the delay but expressing confidence in his ability to hold the merchants in line until the arrangements could be completed and sure that once the "adjustments which are very important" were concluded by the Union Pacific officials "we can make better progress."

Although it developed in the present case that the Union Pacific had DeOreo on the payroll of a subsidiary from November, 1938 to the time of the trial, with the exception of the months that he was in Denver, and although it appeared that Mr. Haugh himself had advised the auditors that the payments were not recollectible,[3] he admitted having testified under oath, in an investigation conducted by the Interstate Commerce Commission into the construction by the Union Pacific and other railroads of competitive food terminals at Denver, that DeOreo had not been employed by the Union Pacific at Kansas City.[4] This testimony was given August 8, 1939, when DeOreo had been on the payroll of the

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[1] Haugh to Jeffers, Dec. 16, 1939, R. 1786-7.
[2] Haugh to Jeffers, Dec. 18, 1939, R. 1787.
[3] Note attached to telegram from Stanley to Haugh, Dec. 20, 1938, R. 2116.
[4] Haugh, R. 1129-30.

Union Pacific subsidiary since November, 1938, except for the few months spent in Denver.

Another example of Mr. Haugh's denials is found in his testimony that he obtained the report of the Stanley-Cooksey-Brown committee [1] from Mayor McCombs who handed it to him for use in his address before the Citizens' Advisory Committee.[2] This report, however, was prepared in the first instance by Mr. Stanley, submitted to Mr. Haugh, revised in accordance with the latter's criticisms and suggestions,[3] and then submitted to the City on the following December 7,[4] four days before Mr. Haugh was even asked to address the joint meeting on December 11 of the Board of City Commissioners and the Citizens Advisory Committee.[5]

(2) *Union Pacific Arranged for Funds to Pay Cash Bonuses.*

The District Court in its findings of fact stated that the Union Pacific devised a plan for raising money to pay the cash bonuses, presented it to the City, urged and secured the City's approval, and joined and cooperated in developing and putting the plan into effect.[6] The plan contemplated that the bonuses were to be paid from the proceeds of an advance payment of rental of $80,000 by the lessee of the Cold Storage Plant at the new terminal and from funds derived by the sale of City warrants issued against future revenues of the food terminal and other public levee properties. The Union Pacific, it also found, proposed the plan to the lessee, the City Ice and Fuel Company, and urged it to advance the $80,000. This money was actually advanced.[7]

[1] Ex. 27, R. 2113.
[2] Haugh, R. 1119.
[3] Stanley, R. 1079-80.
[4] Stanley, R. 1063.
[5] Haugh to Jeffers, Dec. 9, 1939, R. 1777; id. Dec. 12, 1939, R. 1180-81.
[6] Finding of Fact 19, R. 351-2.
[7] Finding of Fact 24, R. 355.

There was a close relationship between the Union Pacific and the City Ice & Fuel Company. The Union Pacific officials had secured the Ice Company as a lessee of the Cold Storage Plant at the terminal. They succeeded in doing so largely by virtue of making contracts whereby the Union Pacific and its affiliate, the Pacific Fruit Express Company, agreed to buy large quantities of ice from the City Ice & Fuel Company.[1] On the part of the Union Pacific, negotiations for the lease and the ice contracts were handled largely by Vice-President Haugh and Executive Assistant Stanley, although President Jeffers also played a part.[2] It was therefore only natural that when it came to negotiations for advance rentals they should be handled by the same men.

On November 24, 1939, when the subject of concessions was actively under consideration by both the Union Pacific and the City, Mr. Stanley talked over the long distance telephone with Mr. Sinek at his Chicago office. A little later in the same afternoon, Mr. Stanley talked over the long distance telephone with Mr. Armstrong of the Pacific Fruit Express Company, at his Chicago office.[3]

Mr. Haugh, who had returned from California to Kansas City on November 28,[4] admits having called Mr. Sinek on the long distance telephone on December 1 or 2, although he asserts that the conversation was on another subject.[5] The City Attorney, Mr. Skinner, said on the stand, "I think—I am not certain—but I think that Mr. Haugh of the Union Pacific also helped" in arranging for payment of the ad-

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[1] Finding of Fact 12, R. 345; Finding of Fact 27, R. 357.

[2] Ex. 17, R. 2041, 2052, 2061, 2069.

[3] Exhibit 261, R. 3216. The date is not shown on the printed reproduction of the call slip of the telephone company. The date of November 24, 1939, is, however, distinctly shown at folio page 6484 of appellees' copy of the original record.

[4] Haugh, R. 1118.

[5] Haugh, R. 1130-31, 1135.

vance rental.[1] Mr. Haugh admits that on Saturday, December 2, he conferred with the City Commissioners and the City Attorney—he says at their request—with respect to obtaining the advance payments.[2] He asserts he raised the question of the legality of financing the payments to the shippers in this way, and after he left the conference he discussed the question with Mr. Bockes, General Solicitor of the Union Pacific.[3] On December 3, Mr. Bockes submitted to Mr. Haugh a rough draft of two forms of contract to be entered into between the City and City Ice & Fuel Company covering the proposed advance.[4] Each form was designed to secure an amount of money "sufficient to enable the City to make cash settlements with * * * prospective tenants." Mr. Bockes expressed willingness to "negotiate with the City Officials on whichever basis you think advisable and which is agreeable to the Ice Company upon advice from you as to which basis is approved."[5] The reference to the Ice Company, as well as the whole tenor of Mr. Bockes' letter, indicates that contact had already been established with the latter company; that the general plan had been agreed upon; and that the only thing left for negotiation was the legal details, something which the lawyer appropriately suggested that he might handle.

Although Mr. Haugh denied on the stand that he gave Mr. Bockes any directions about negotiating, saying that the Union Pacific attorneys "had mighty little to do with" the matter "other than look up law" at the request of Mr. Skinner,[6] Mr. Skinner says that the Union Pacific General Solicitor showed him two forms of contract for advance rental payments by the City Ice & Fuel Company and went

[1] Skinner, R. 816.
[2] Haugh, R. 1131-2.
[3] Haugh, R. 1131-2, 1134-5.
[4] Haugh, R. 1132, 1134-5.
[5] Bockes to Haugh, December 3, 1939, R. 1770-71.
[6] Haugh, R. 1132.

over them with him, at the same time giving "his idea as to how the matter of settlements with desirable tenants who thought they should have adjustments could be handled."[1] At what Mr. Skinner says was his request, Mr. Rouse, an attorney for the Union Pacific, prepared two or three further drafts, one of which, representing a revision of one of the original drafts submitted by the General Solicitor, was finally adopted by the City Attorney's office without change.[2]

Mr. Haugh admits various long distance telephone conversations with Mr. Sinek, other than the one already mentioned, during the period when the advance from the City Ice & Fuel Company was being negotiated.[3] He also admits that he had various talks with Mr. von Weise, Vice President, and Mr. Aaron, attorney, of the City Ice & Fuel Company, who were in Kansas City during a part of the time the negotiations were under way; and, while he insists he did not negotiate he admits that he discussed the advance rental matter when he met them.[4]

During this period the telegraphic reports which Mr. Haugh made from Kansas City to President Jeffers in Omaha are as usual quite revealing. On December 8, Mr. Haugh reported that Mr. von Weise and Mr. Aaron were in Kansas City and that "Mr. Sinek has an executive committee meeting in Cleveland today and will recommend authority on payment advance rental."[5]

On the evening of December 11, Mr. Haugh presented the plan by which the City was to obtain an advance rental of $80,000 to pay the cash adjustments to a joint meeting of the City Commissioners and the Citizens Advisory Committee. "I presented matter fully and importance of it,"

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[1] Skinner, R. 853.
[2] Skinner, R. 853-7.
[3] Haugh, R. 1130-31, 1136, 1138-41.
[4] Haugh, R. 1136-7, 1139-40.
[5] Haugh, R. 1136.

he said.[1] Among other things, he said that "A method of taking care of the expenditures necessary to make the settlement, which had been under consideration by the Board of City Commissioners and the City Attorney of Kansas City, Kansas, contemplates that the city will secure an advance payment of rental from certain tenants of the facilities in the Kansas City Food Terminal, the City agreeing to credit such tenants with such payments as advance rentals under their leases."[2] The next day, December 12, he reported to the President of the Union Pacific the complete success of his endeavors. "There was no dissenting vote," he said, "not even from the third commissioner," apparently Commissioner Darby, who, because of his doubts concerning the propriety of the concessions had refused to join in the call for a meeting. "We have handled the matter," he said, "so that it is entirely clear legally for every interest concerned, the Railroad, Cold Storage Co. and the City."[3] The real truth of the matter is revealed in this tersely worded sentence of Mr. Haugh's telegraphic report. In the first place, it identifies the persons handling the affair of raising the money and paying the adjustments. "We" have handled the matter, Mr. Haugh said; and, of course, "we" doesn't mean a group of strangers—it means the Union Pacific officials, including Mr. Haugh and Mr. Stanley, and it means the City officials. Then the report identifies those involved in the delicate arrangements. They were "the Railroad, Cold Storage Co. and the City"—"every interest concerned." And how had the matter been handled for the railroad, the Cold Storage Company, and the City? Mr. Haugh a little proudly supplies the answer, saying,

[1] Haugh to Jeffers, December 12, 1939, Exhibit 12, R. 1780.

[2] Haugh, "Memorandum respecting problems confronting Board of City Commissioners of the City of Kansas City, Kansas, in connection with the establishment of the produce terminal on the public levee in the City of Kansas City, Kansas," December 9, 1939, Exhibit 13, R. 1946, 1950.

[3] Haugh to Jeffers, December 12, 1939, R. 1780-81.

"We have handled the matter so that it is entirely clear legally"—this apparently being a reference to what he evidently considered the outward color of legality given to the arrangements by employment of the official machinery of the City.[1]

On cross-examination, Mr. Haugh was asked whether he had not also reported on December 12 to Mr. Sinek by long distance telephone. At first he said that he might have done so. He would not say that he didn't and would not say that he did, but only that if he called Mr. Sinek he probably told him about the Advisory Committee meeting and the approval of the general policy. When, after he had parried questions for a while, he was asked pointblank why he had called Mr. Sinek twice on the long distance telephone the day after the night meeting at which the City had definitely committed itself to going through with the concession payments, he replied, "To talk with him. • • • But I don't remember what I said. • • • It does not register in my mind at all."[2] The records of calls

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[1] Haugh to Jeffers, December 12, 1939, R. 1780-81.

[2] The examination of Mr. Haugh on this subject was in part as follows:

"Q. Didn't you call Mr. Sinek on that same day that you wrote to Mr. Jeffers telling him that you had handled it or that we have handled it so that it is entirely clear legally to everybody? Didn't you tell Mr. Sinek the same thing?

"A. I didn't tell him that because he had a lawyer of his own. It would be perfectly ridiculous for me to tell Mr. Sinek what was lawful for his Company when he had a very competent lawyer.

"Q. Did you call Mr. Sinek at all on that day?

"A. I may have. I won't say that I didn't. I may have called him.

"Q. Didn't you when you called him tell him about the results of the previous day's meeting?

"A. If I called him I probably told him about that Advisory Committee meeting and that they had approved the general policy.

"Q. Don't you remember that you did?

"A. I know that Mr. Sinek was extremely interested in the opening of this Terminal because he had a might heavy obligation there on that Cold Storage Plant to pay around $39,000 a year for 15 years. And that is a lot of money, about $600,that he was obligated for his Company.

of the telephone company show that Mr. Haugh called Mr. Sinek twice on December 12.[1]

On December 21, Mr. Haugh wrote Mr. Sinek "confirming our phone talk today," sending "contract providing for the advance by your company of $80,000," and asking that Mr. Sinek "please arrange for execution of the attached contract and forward it to Mr. Stanley for delivery to the City."[2] A little later the contract was signed. The $80,000 was advanced, and was about to be paid out in satisfaction of

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"Q. Didn't you keep him in touch with the developments knowing of his great interest?

"A. Well, he had representatives here, you know, himself. Mr. Rhode was here part of the time, Mr. Von Weisse was here part of the time, Mr. Aarons was here part of the time and Mr. Sinek was mighty well represented here.

"Q. You knew that, did you?

"A. Practically all the time, yes, I knew it.

"Q. You talked to those gentlemen didn't you?

"A. I saw them off and on.

"Q. And talked to them about these negotiations between the City?

"A. I did not negotiate with them, Mr. Gibson.

"Q. Did you talk to them about the advance of this $80,000?

"A. I don't know that I did. Mr. Aarons might have spoken about it.

"Q. Wasn't that uppermost in your mind?

"A. I wouldn't say that it was.

"Q. Don't you know that it was uppermost in their minds?

"A. Well, I don't know that that was uppermost. The uppermost thing in their minds was the opening of that Terminal and getting tenants in it. That was the principal thing.

"Q. Why did you call Mr. Sinek twice on the Long Distance telephone on December 12?

"A. To talk to him.

"Q. What did you tell him?

"A. Well, I don't remember. I have reported to him. I told him about the Advisory Committee meeting of the day before and I talked to him about the general situation over at the Terminal. But I don't remember what I said.

"Q. Didn't you talk to him about this $80,000 advance?

"A. I did not negotiate with Mr. Sinek about that $80,000.

"Q. That is not a question. I asked you, didn't you talk to him about that $80,000 advance rental?

"A. It does not register in my mind at all.

"Q. Will you state that you didn't talk to him about it?

"A. If I did, it doesn't register in my mind."—Haugh, R. 1139-40.

[1] Ex. 260, R. 3212.

[2] Haugh to Sinek, December 21, 1939, R. 1788.

the promises of cash bonuses when the temporary restraining order of the District Court interfered.[1]

There is more evidence to the same effect, but that already reviewed sufficiently indicates the firm evidential basis for the finding of the District Court regarding the role of the Union Pacific in securing the advance payment of rental by the City Ice & Fuel Company.

(3) *Cash Bonuses and Rental Concessions Were Payable Out of Money and Property in Which Union Pacific had Beneficial Interest.*

The appellants strenuously contend that none of the concessions were given or intended to be given out of money or property owned by the Union Pacific, but this contention has already been shown to be without foundation with respect to trips and free advertising. It is almost equally without foundation as a matter of substance with respect to the cash bonuses and rental concessions.

The funds for the cash bonuses and properties whose occupancy was given free or for inadequate considerations were funds and property in which the Union Pacific has a substantial interest. The money was not to come from the taxpayers of the City or out of general funds in its treasury but out of the public levee fund.[2] The food terminal is not ordinary, municipal property built for governmental purposes with funds derived from the taxpayers of the community, but a proprietary business enterprise of an extraordinary character largely developed with private funds supplied by the Union Pacific.[3]

All of the concessions were to come from this anomalous enterprise, promoted by the Union Pacific and jointly funds supplied by the Union Pacific.[3]

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[1] Skinner, R. 819, 906.

[2] Findings of Fact 24, 34. R. 355, 359-60.

[3] Opinion below, pp. 4-6, R. 242-45; Findings of Fact 10-15, R. 343-49.

and the City.[1] Of the total cost of $3,826,000 of the terminal facilities south of Jersey Creek owned by the City approximately $1,967,000 was furnished by the Union Pacific through the purchase of revenue bonds,[2] not to mention $40,000 of preliminary expenses which it advanced[3] and not to mention the value of the services of a large number of Union Pacific officers, employees and agents in the project.[4] Aside from furnishing the land the City's only contribution of money was $149,000 used for street and sewer improvements in the terminal area.[5] The City was unwilling to contribute more; it was asked to do so but refused, because of promises made to its citizens, who while apathetic about the project[6] were willing to see it constructed if others put up the money.[7] The Union Pacific originated the plan of securing a Public Works Administration grant, and the $1,700,000 secured from this source was obtained with its assistance.[8] It could not have been obtained at all if the Union Pacific had not put up the major part of the funds by the purchase of the revenue bonds. The raising of these private funds was an express condition of the P.W.A. grant.[9]

The revenue bonds are bonds only in a special sense. The City assumes no obligation for interest or for repay-

[1] Id. See also Findings of Fact 17-21. R. 350-54.
[2] Finding of Fact 16. R. 349-50.
[3] Finding of Fact 12, R. 344-6.
[4] Finding of Fact 12, R. 344-6.
[5] Finding of Fact 16, R. 349-50.
[6] Reed to Mitchell, Aug. 7, 1937, Ex. 14, p. 31, Rec. 1990.
[7] Stanley to Haugh, May 5, 1938, Ex. 5, p. 20, Rec. 1591.
[8] Findings of Fact 12 and 13, R. 344-6.
The Union Pacific even paid the traveling and living expenses of the City officials when they went to Washington to appear before the P. W. A. (Opinion below, p. 5, R. 243-4). There is no evidence to indicate that the P.W.A. knew of this fact or other facts of similar import indicating the Union Pacific domination of the project. While the Union Pacific's general interest in the project and the plan to have it operate the railroad facilities were known, the project was presented as one of a public rather than of a private nature.
[9] Ex. 6, pp. 40-1, R. 1632-3.

ment of principal except from the revenues of the public levee. If these prove insufficient the holder of the bonds has no further recourse. The bonds are not secured in the ordinary way by right to foreclose on some specific property in the event of default but merely by the revenue of the public levee on which the bondholder is given a first lien subject only to the payment of ordinary operating expenses.[1]

The securities were not commercially salable to investors dealing at arm's length. They were turned down by the investment banking house of Stifel, Nicolaus & Co. as too risky and speculative.[2] Since no other purchaser could be found[3] the Union Pacific bought them because of its interest in the traffic which the operation of the terminal would divert to its lines.[4]

The Union Pacific has the most important financial stake in the enterprise. Under the bond covenants it is entitled to have all of the revenues of the public levee above operating expenses applied not only to the payment of interest but also to the repayment of principal as long as any of the issue is outstanding.[5] This will give it all of the net revenue of the levee for the next twenty-two years even under the roseate estimates of the City's witnesses who optimis-

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[1] Finding of Fact 13, R. 346-7.

[2] Finding of Fact 13, R. 346-7.

The only reason why Stifel, Nicolaus & Company ever considered the purchase of the bonds for resale to its clientele was because the Union Pacific had offered to make a guaranty of the amount required for servicing the debt over and above the rentals from leases entered into by the large and stable corporate lessees such as the Hart-Bartlett-Sturtevant Grain Co. (Ex. 13, p. 36; R. 1813-4.)

[3] After Stifel, Nicolaus & Co. refused to buy, the bonds were advertised for sale but the Union Pacific was the only bidder. The Union Pacific officials are on record as saying they knew they could not resell the bonds within a year's time. Clarke to Bockes, November 9, 1938, Ex. 7, R. 1662-3.

[4] Findings of Fact 13, 28-32, R. 346-7, 357-9.

[5] Finding of Fact 34, R. 359-60; Ex. 62-B, p. 34 (Sec. 11, Ordinance 30-206 of November 3, 1938).

tically overstated the prospective revenues and understated the inevitable expenses.[1] Actually, there is every reason to believe that it will be the recipient of all of the revenue of the public levee for a much longer time. In any event it takes most, if not all, of the risk of the enterprise; it will get its money back only in the event of the success of the project which may or may not be achieved.

It is in the light of this situation that the alleged lack of interest on the part of the Union Pacific in the moneys in the public levee fund and in the facilities of the terminal, used or planned to be used in giving concessions, must be examined. Under these facts can it be said that when the Union Pacific arranges for the payment of cash bonuses out of the public levee fund it is arranging for the payment of the City's money? Or can it be said that when it arranges for free or reduced rents or inadequate rents for the occupancy of the terminal facilities that the arrangements are with respect to property in which it has no interest? Can it be said that because the legal title to the money and to the produce warehouses is in the City, it is the City and not the Union Pacific which is bearing the burden of the gift?

The lack of any substantial financial stake in the City is admitted. It was used by members of the Board of City Commissioners to allay the apprehension of the citizens of the City over the project by telling them that the City was assuming no obligation, all of the money being put up by the Union Pacific and the Federal Government.[2] In the

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[1] Finding of Fact 34, R. 359-60.

[2] Two of the three members of the Board of Commissioners refused to vote for the issuance of $100,000 in general obligation bonds for one of the projects incident to the construction of the terminal—the enclosure of sewer-laden Jersey Creek running east and west through the center of the site. Mr. Stanley, writing Mr. Haugh May 5, 1938 of a meeting with the City Commissioners reported: "There were some favorable indications that Darby and Schaible would finally agree on this project but it was also stated that they had repre-

application for a loan from the Public Works Administration the terminal was presented as a public project,[1] and it was prosecuted partly by Union Pacific officials and partly by City officials traveling to Washington on money advanced by the Union Pacific[2]—a fact which was of course withheld from the Public Works Administration.

(4) *Union Pacific Waived Its Lien on Funds so That They Could Be Used to Pay Cash Bonuses.*

The District Court held that the cash bonuses to the shippers were intended to be paid by the appellants partly out of an advance payment of rental of $80,000 made by The City Ice & Fuel Company at the request of the Union Pacific for that purpose.[3] The court also held that the Union Pacific, by virtue of the terms of the indenture of the revenue bonds which it purchased and owned, is given a first lien upon all rentals from the Kansas City Food Terminal.[4] It found that in *State, ex rel. Parker* v. *Kansas City*[5] the City sought and obtained a decision by the Supreme Court of Kansas holding that it had power to pay the cash bonuses; that the Union Pacific assisted in the preparation of drafts of both petition and answer and otherwise assisted in the proceeding; and that the Union Pacific, at the hearing before the Supreme Court of Kansas, stated that it approved of the use of the advance rental payment to pay cash bonuses and took the position that the court should not interfere with such program.[6]

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sented to the citizens that the food terminal would be financed by revenue bonds and that to start out by issuing about $100,000 in general obligation bonds might precipitate some criticism." (Ex. 5, p. 20, R. 1591.)

[1] Ex. 20, pp. 4-15, R. 2085-96; Weedin to Mitchell, Feb. 4, 1937, Ex. p. 3, R. 1965-7.

[2] Ex. 37, R. 2273-8; Opinion Below, R. 243-4; McCombs, R. 907-9.

[3] Finding of Fact 24, R. 355.

[4] Conclusion of Law 12, R. 371.

[5] (1939), 151 Kan. 1, 97 Pac. (2d) 104; (1940), 151 Kan. 2, 98 Pac. (2d) 101.

[6] Finding of Fact 25, R. 355-6.

The court held that the Union Pacific's conduct in promoting and negotiating the plan of paying cash bonuses out of the advance rental, and by urging the Supreme Court of Kansas not to interfere with such use of the money, constituted a waiver of its lien on the advance rental payment of $80,000.[1] It held that in deciding *State ex rel. Parker* v. *Kansas City, supra*, the Supreme Court of Kansas confined itself to holding that the City would not violate any law of the State of Kansas by making the payments and did not determine or attempt to determine any issue in this case—referring, of course, to the issue whether the Union Pacific waived its lien on the $80,000 advance rental payment to facilitate the payment of cash bonuses.[2]

The appellants contend: (1) the question of the existence of the lien must be determined by the law of Kansas; (2) the Union Pacific had no lien and the Supreme Court so held; and (3) since the Union Pacific had no lien upon the money it could have made no waiver.

There can be little controversy with respect to the first and third contentions. Concededly the law of Kansas is governing. The District Court so recognized but held that the Supreme Court of Kansas had not passed on the issue.[3] If the Union Pacific had no lien, certainly it waived none. If it had a lien it was manifestly waived.

If there was a lien it was waived by the Union Pacific, not only by its representations to the Supreme Court of Kansas but by the whole course of its conduct with respect to the cash bonuses. The railroad carried on negotiations with the produce dealers for cash concessions over a long period of time, convinced the City of the necessity for paying them, worked out the scheme of obtaining advance pay-

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[1] Conclusion of Law 12, R. 371.
[2] Conclusion of Law 13, R. 371-2.
[3] Conclusion of Law 13, R. 371-2.

ment of rental from The City Ice & Fuel Company, and secured the approval of the scheme by the City.[1]

Unknown to the court but with the connivance of the City, the Union Pacific's attorneys participated on both sides of the *quo warranto* proceeding, assisting in the drafting of both the petition of the Attorney General and the answer of the City.[2] They caused the insertion in the City's answer of the allegation to the effect that the Union Pacific as a bondholder consented to the use of money from the public levee fund to pay the cash concessions,[3] an allegation admitted by the Attorney General's motion for judgment on the pleadings, as one of the Union Pacific attorneys pointed out to the Court at the time,[4] the attorney asserting that he represented the Union Pacific as the bondholder and as the investor of some $500,000 in the construction of tracks and facilities to serve the market, urged approval of the resolution of the City authorizing payment of the cash bonuses, and asked for the dismissal of the Attorney General's petition. No waiver could have been more complete. By its conduct the Union Pacific assuredly debarred itself from ever questioning the legality of the payment.

The main controversy is over the second contention of the appellants to the effect that there was no lien. They contend that no lien was given by the State statute and that the Supreme Court of Kansas so held in *State, ex rel. Parker* v. *Kansas City, supra.*

The Kansas statute providing for the building of the food terminal authorized the City to issue revenue bonds, and, since the only security was to be the revenue from the improvements, authorized certain safeguards to be given. As

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[1] Findings of Fact 19 and 20, R. 351-4; Finding of Fact 24, R. 355.

[2] Finding of Fact 25, R. 355-6.

[3] Finding of Fact 25, R. 355-6; Conclusion of Law 12, R. 371; Answer of City to petition in *quo warranto*, Section III, R. 63.

[4] Hurd, R. 664.

one safeguard, the City was authorized to "create a lien on the revenues to be obtained from such property and facilities and pledged the payment to said revenue bonds and interest thereon."[1]

The bonds so authorized were issued by the City under the indenture set forth in Ordinance No. 30,206, as amended. In Section 10 of this instrument the City agrees to maintain a special fund known as the "Public Levee Fund" for handling the revenue and expenses of the public levee. By the same section it agrees to maintain another special fund known as the "Public Levee Terminal Revenue Bond Fund" and to maintain in that fund sufficient money to cover interest and sinking fund requirements on the bonds for one year in advance. By Section 11 it agrees that all revenues not needed for the payment of operating expenses and the maintenance of the bond fund should be used for the purchase and retirement of outstanding bonds. In short, as long as the bonds are outstanding every penny of net revenue received from the levee properties must be devoted to the payment of principal and interest on the bonds. And finally, to protect the gross revenue from diversion, the bondholder is given, by Section 10, a first lien not on the net revenues but on all moneys in the Public Levee Fund, subject only to sums required for the reasonable and proper operation, maintenance, and repair of the levee.[2] That section reads in part as follows:

> "The Public Levee Terminal Revenue Bonds of said City issued pursuant to the provisions of this Ordinance shall constitute a first lien and claim on said fund and on the revenues of said Public Levee, subject only to the payment of all sums required for the reasonable and proper operation, maintenance and repair of said Public Levee. * * *"[3]

[1] G. S. Kansas, 1935, Sec. 13-1240.

[2] Ex. 62-B, Ordinance 30,206, Sections 9, 10 and 11, R. 2557, 2571-3.

[3] Ex. 62-B, Ordinance No. 30,206, R. 2571.

Since the Union Pacific as the bondholder has a valid contractual lien on the moneys in the public levee fund, except those required for the reasonable and proper operation, maintenance and repair of the levee, the next question is whether the funds required for the payment of cash concessions to prospective tenants of the food terminal fall within the excepted category. Are payments for such a purpose to be regarded as "required for the reasonable and proper operation, maintenance, and repair of said public levee?"

Very plainly, cash bonuses to prospective tenants have no connection with the repair of the public levee or its maintenance in good operating condition. If they are a class of expenditures falling within the permitted category, they must be sums required for the reasonable and proper operation of the levee. In other words, they must be items of ordinary operating expense. Manifestly, they are not ordinary items of operating expense. As Mr. Haugh wrote to Mr. Jeffers on December 12, 1939, they represent expenditures of an unusual character. The arrangement for these payments was "an unusual transaction," he said, and "I expect this to be given very wide attention throughout the country because of its very unusual nature."[1]

This type of outlay on appellants' own theory represents an initial cost of establishing the business of the food terminal, and is an expense which is regarded as a part of development cost and as such held to be a capital item rather than a proper charge to operating expenses.[2] Such a capital outlay could not be made from the public levee fund without a waiver of the Union Pacific lien.

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[1] Ex. 12, p. 25, R. 1781.

[2] *Southwestern Bell Tel. Co.* v. *Ft. Smith* (1923), 294 Fed. 102, 103-106, affirmed (1926), 270 U. S. 627; *Denver* v. *Denver Union Water Co.* (1918), 246 U. S. 178, 185-186, 191-192; *Landon* v. *Public Utilities Commission* (1917), 242 Fed. 658, 671; *Pioneer Teleph. & Teleg. Co.* v. *Westenhaver* (1911), 29 Okla. 429, 118 Pac. 354, 38 L. R. A. (N. S.) 1209, 1222; 1, *Spurr, Guiding Principles of Regulation*, 555-573.

The appellants seem to have realized from the beginning that the payment of a cash bonus is not an ordinary operating expense. At the very least they recognized it as a question of a gravely doubtful nature, so doubtful as to require judicial determination before they could proceed with safety. Holding this view, they took steps to get the proceeding before the Supreme Court of Kansas in the *quo warranto* case in which they participated on both sides; the Union Pacific and the City assisting in the drafting of the Attorney General's petition in *quo warranto* and the Union Pacific and the City jointly preparing the City's answer.[1]

In the petition in *quo warranto* the charge is expressly made that the payment of the cash bonuses would be violative of the provisions of Ordinance No. 30206, giving the bondholder a lien on the public levee fund.[2] The City officials, in their answer, drafted jointly by their attorneys and those of the Union Pacific, admit that Ordinance 30206 constitutes a binding contract between the City and the bondholder and that the bondholder has a lien on the Public Levee Fund subject only to the payment of all sums required for the reasonable and proper operation, maintenance, and repair of the public levee.[3] They go on formally to "deny that said payments are not of the character or for the purpose authorized by said Ordinance 30206 and deny that the making of such payments and credit allowances would be contrary to or in violation of the provisions of Ordinance 30206. * * *"[4] The real answer of the City officials was, however, that the Union Pacific had assented to the proposed use of the funds; the allegation being:

> "That the holder of all of the revenue bonds issued pursuant to ordinance 30206, as amended, recognizes that expenditures of the kind and character contem-

[1] Finding of Fact 25, R. 355-6.
[2] Petition in *quo warranto*, Sections VIII and IX, R. 31.
[3] Answer in *quo warranto* proceeding, Section III, R. 61-2.
[4] Answer in *quo warranto* proceedings, Section IV, R. 63.

> plated under said Resolution 11275 are legitimate and proper expenses incident to the *establishment* and operation of said food terminal and properly payable out of the revenue fund of said Public Levee, and that the sums required for that purpose are not subject to the pledge or lien of said bonds." (Italics ours.)[1]

There are two significant things about the answer of the appellant City on this point: *First.* While there is a formal denial that any rights of the bondholder are violated, the real defense is that the bondholder has consented to the plan—a course which indicates that the drafters of the answer, while desiring to frame a technical issue, were sufficiently apprehensive of the question to seek to avoid a searching inquiry into the merits by pleading lack of objection on the part of the bondholder, the only one having any right to object.

Second. The wording of the portion of the answer just quoted indicates the difficulty and distress of the pleaders in framing a logical, tenable answer. Counsel quite evidently realized that it would be far fetched to claim that these cash bonuses, paid out initially to fill up the terminal with tenants, are "sums required for the reasonable and proper operation" of the levee. Realizing this weakness, they imported another term—a term not found in the language of the ordinance but introduced for the first time in the pleadings to bolster the defense. The allegation was not that the proposed expenditures were legitimate and proper expenses incidental to the operation of the terminal, but that they were "legitimate and proper expenses incident to the *establishment* and operation of said food terminal." Now the expense of establishment of a business is not an operating expense—it is a capital item—and the answer of the City in the *quo warranto* proceeding is prac-

[1] Answer in *quo warranto* proceedings, Section III, R. 63.

tically an admission that the expenditures could not be defended solely on the basis of constituting an expense of operation.

It may be taken as established, therefore, from the face of the bond indenture and from the conduct of the parties with respect to the matter, that the lower court was right in holding the Union Pacific did have a lien upon the $80,000 advance payment of rental.

The next question is whether there is anything in the decision of the Supreme Court of Kansas in *State, ex rel. Parker* v. *Kansas City, supra,* which requires a contrary conclusion.

One reads the two decisions of that court in vain for any suggestion that there was before it any issue concerning the rights of the bondholder against the City to prevent the diversion of funds to pay the cash concessions. Despite the fact that this issue was expressly raised in the petition, it is not mentioned in the opinion of the court. The other issue raised by the pleadings—the corporate power of the City to make the payments—is alone recognized. There are at least two reasons why the court did not consider the second question.

The first reason is because as already noted the Union Pacific had consented to the diversion of the funds. A second and equally valid reason why the court did not pass upon the private rights of the Union Pacific as a bondholder is that this was not a question cognizable in an action in *quo warranto.* This action is an extraordinary remedy, confined in its scope to controversies concerning title to office, the authority of public officials, and the like. It may not be used to litigate the rights of parties under a contract even though one of those parties may be a municipal government. Neither in Kansas nor elsewhere does

quo warranto lie to try private claims or to vindicate private rights.[1]

These considerations point inevitably to the conclusion that the Supreme Court of Kansas, in *State, ex rel. Parker* v. *Kansas City*,[2] confined itself to deciding the single question of the statutory authority of the City to make the payments. It neither considered nor decided any other question. It took no notice of the charge made in the petition of the Attorney General in *quo warranto* that the payment of cash concessions out of the public levee fund would violate the contract between the City and the Union Pacific, giving the railroad, as the purchaser of the bonds, a first lien on all of the money in that fund not required for operating expenses. It left untouched the question with which we are here concerned.

In short, the Supreme Court of Kansas, as the court below correctly held, did not determine or attempt to determine any question concerning the existence, impairment or waiver of the lien of the Union Pacific. There is nothing then in the decision in *State ex rel. Parker* v. *Kansas City, supra,* which has the effect of disturbing the conclusion required by a consideration of the bond indenture, by the statute under which it was authorized, and by the other evidence, that the Union Pacific had a lien on the advance rental payment of $80,000. Having such a lien the Union Pacific deliberately waived it for the purpose of making possible payment of the cash bonuses which its officers and agents promised to the shippers to induce them to move to the new terminal.

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[1] *Johnson* v. *Manhattan Ry. Co.* (1933), 289 U. S. 479. *State ex inf. Crow* v. *Atchison, Topeka & Santa Fe Ry. Co.* (1903), 176 Mo. 687. *Jansky* v. *Baldwin* (1926), 120 Kan. 728.

[2] (1939), 151 Kan. 1, 97 P. (2d) 104; (1940), 151 Kan. 2, 98 P. (2d) 101.

5. *The Offers Were Not Confined to Losses Sustained by Shippers by Reason of Moving but were Made as Large as Necessary to Induce Shippers to Move to the New Terminal.*

The appellants contend that the concessions were offered in settlement of claims made by the produce dealers against the City, but this theory has all of the earmarks of an amiable fiction invented for the purpose of defense of this lawsuit. Actually, the produce dealers were the subject of intensive solicitation. It was the Union Pacific, with immediate charge of the campaign for the solicitation of tenants for the produce warehouses, which was exerting the arts of high-pressure salesmanship, trying to convince the produce dealers that they would benefit themselves by moving to the new terminal. The evidence pretty clearly shows that from the very beginning the Union Pacific felt forced to resort to more tangible inducements than arguments with respect to the inherent advantages of its terminal. Mr. DeOreo says that it was hard to get shippers to serve on the Merchants Committee, which must be the reason why he felt it necessary to offer the committeemen $5,000 apiece.[1]

Just before the terminal opened, the Union Pacific felt that it was "a very delicate proposition to get the merchants to agree to move at one time and we have much to do in that direction."[2] This situation accentuated the need for monetary inducements, for giving the shippers any sum within reason high enough to be a controlling inducement. One of the dealers, Henry Winnick, testified about a conference in which Mr. DeOreo asked "about how much it would take to get you over there."[3] Similarly, Mr. Stanley, in his first discussion with Mr. Marshall of O. C. Evans

[1] DeOreo, R. 619-21.
[2] Stanley to Schaible, Oct. 24, 1939, Ex. 13, p. 215, R. 1943-4.
[3] Henry Winnick, R. 610.

Company, wanted to know what kind of a proposition that Marshall was going to make. When Mr. Marshall declined to make any, Mr. Stanley said he would recommend a payment of $5,000, without saying how the sum was computed. Marshall rejoined that he was not interested. When, after further negotiations, Marshall said he wanted $10,000 to move, Stanley said he would get him $7,000.[1] Mr. Simon Yukon testified that Mr. Stanley asked him how much money his company wanted for moving its business to the new terminal.[2] The testimony of these witnesses is just as inherently probable as the testimony about the claims being filed by produce dealers against the City is improbable. But even if the so-called claims were actually made as alleged, they were wholly unfounded. The produce dealers had no claims, legal, equitable, or moral, against the City, which had trespassed upon none of their rights, inflicted no injury upon them. The City was liable for no damages because it wanted the shippers as tenants of the warehouses at the terminal. The practical issue at stake was not whether the City was liable for damages but whether the Union Pacific and the City could or would pay sufficiently attractive concessions to induce the shippers to move.

In any event, the question whether the concessions could legally be paid depends not on what the shippers were to give up but on what the Union Pacific or the City was to receive. If they were to receive nothing or to receive something of less value than what they were to give, the payments would constitute a gratuity or a consideration for the removal of the shipper's business to the new terminal. What they were to receive had little value. It consisted, not of assets, but of liabilities—of losses purportedly incurred by the produce dealers in moving, arising out of the obligation of some dealers to continue to pay rent on unexpired leases

[1] Marshall, R. 713-16.
[2] Yukon, R. 600-603.

on former places of business in Missouri and out of the abandonment of furniture and fixtures at the old premises.[1]

Quite true in the settlement with Sam Litman, payment to whom was barely stopped by the entry of the temporary restraining order, title to the fixtures and equipment passed to the City,[2] but it is not clear in this or any other case that the fixtures were removable or that the furniture and fixtures were of any substantial value to the City. Every inference is to the contrary in view of their abandonment by the produce dealers under a claim that the move to the new terminal had occasioned a total loss of the value of this property.

The leasehold interests in the abandoned premises in Missouri were not assigned to the City. Instead, the produce dealers were required to agree that the premises would not be sublet to anyone engaged in the fruit and produce business or to anyone else without the consent of the City—which is indicative of a plan to prevent Missouri property adapted to the produce trade from being devoted to its normal use, competitive with the new Kansas terminal during the unexpired terms of the abandoned leases. In case the property were sublet with the City's consent, the rental received was required to be paid over to the City,[3] but the prospect of subletting was small. There were a number of vacant buildings in the produce district in Missouri, and with the proposed transfer of the center of trade to the new Kansas terminal, rental prospects would further decline.

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[1] In advocating these payments before the Citizens' Advisory Committee, Mr. Haugh said that they were to take care of "certain costs * * * incurred by some prospective tenants due to rental obligations on present places of business and costs due to abandonment of equipment and facilities located in said places of business" (Exhibit 13, page 219, R. 1947.) In the same speech he also referred to the payments as covering "elements of damage making up the costs incurred" (id. page 222, R. 1950). In its answer in the Quo Warranto Case the City said that 13 of the prospective tenants were "bound by existing contracts for unexpired rentals on leases upon property heretofore occupied by them" and "will incur the cost of unamortised investment in fixtures and equipment which they will be required to abandon and moving and miscellaneous costs", R. 66.

[2] Exhibit 62-B, page 107, R. 2674-5.

[3] Exhibit 62-B, page 106, R. 2673.

In fact, the situation was such as to lend plausibility to the feaf of the produce dealers that after they moved to the new terminal, payments on unexpired leases in the Missouri produce district would represent a total loss.[1]

While the claims of the produce dealers were purportedly submitted on the basis of the full remaining payments due under unexpired leases and the full original cost of the abandoned furniture and fixtures,[2] they were in a number of cases inflated and exaggerated.[3]

The inescapable conclusion from the evidence is that the value of the furniture, fixtures, and other things to be turned over to the City was comparatively small and that by far the greater part of the so-called cash adjustment in each case represented nothing other than a consideration for the transfer of the dealer's business to the new terminal and for agreeing not to engage directly or indirectly in the wholesale produce business in Kansas City, Missouri.[4] The concessions offered to the shipper were merely gifts, gratuities, or bonuses offered to a shipper to secure his patronage of the new terminal.

6. *Union Pacific Participated in Offering or Giving Unsecured or Inadequately Secured Loans.*

When Messrs. Stanley and DeOreo were seeking to induce produce dealers to move to the new terminal they promised, among other things, that if they moved they would be given bank loans.[5] The subject was discussed at one of the meetings of the Merchants Committee employed to assist in the promotion of the terminal.[6] The question naturally arose as to how the loans were to be given and

[1] Sheahan, R. 469.

[2] Exhibit 105, R. 2851.

[3] Winnick, R. 611; Litman, R. 550-51; Tierney, R. 722-3; Robinson, R. 567; Fermaturo, R. 710; Ex. 27, R. 2188; Zeigler, R. 458-9, 495; Burns, R. 451; Sheahan, R. 467-71; Ex. 27, p. 10, R. 2179; R. 1079-80.

[4] Ordinance No. 31161 of Kansas City, Kansas, Ex. 62-B, p. 106.

[5] Rosensweig, R. 647; Arcury, 649; Marshall, 715.

[6] Breidenthal, R. 650-51.

where they were to be obtained. The Union Pacific, in view of the Elkins Act, was adverse to making direct loans to the shippers.[1] Some of the banks in Kansas City, Missouri, were willing and even anxious to make loans to the tenants who moved to the new terminal,[2] but these Missouri bankers were apparently interested only in loans justified on sound banking principles. The Union Pacific was interested in loans of another character. Mr. Stanley rode part of the way to California with Mr. Haugh, on November 19, 1939, for a discussion of problems incident to the opening of the new terminal. Mr. Haugh arranged for Mr. G. F. Ashby, Assistant to the President of the Union Pacific, to make a trip to Kansas City for the purpose of discussing bank credits with Mr. Stanley and Mr. Breidenthal.[3] President of the Friendly Review State Bank of Kansas, City Kansas. He also arranged for Mr. H. A. Toland, General Auditor, Mr. W. S. Ure, Auditor, Station Accounts, of the Union Pacific, and L. H. Salmen, of the Kansas City Industrial Land Company, to talk with a committee of bankers "about banking credits of jobbers in the new KC Food Terminal."[4]

On November 24, as already shown, Mr. Stanley talked over the long distance telephone with Mr. Sinek, Vice Presi-

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[1] Ex. 10, p. 48; Spencer to Bockes, R. 1742-3.

[2] On November 13, 1939, Mr. Taylor S. Abernathy, Vice President of The First National Bank of Kansas City City, wrote to Mr. Stanley asking for a list of firms "with whom you are making leases over there", and adding also: "I realize that possibly they will do their banking business in Kansas City, Kansas, but at least it will do no harm to present an invitation to them to use the First National Bank. If there is anything that we can do to be of help to you in return, I hope you will let me know." Ex. 13, p. 165, R. 1913.

On November 22, Mr. Haugh telegraphed Mr. Stanley, saying:

"Mr Dunlap vice president, Bank of America was in Kansas City last week. He told me here that the bankers whom he saw at Kansas City, Missouri, were very much disturbed lest the Kansas City, Kansas banks would get the accounts for the new market." Ex. 13, p. 216, R. 1944.

[3] Ex. 12, R. 1765-6.

[4] Ex. 12, R. 1765.

dent of The City Ice & Fuel Company, and Mr. J. T. H. Armstrong of the Pacific Fruit Express Company, both of whom had offices in Chicago. December 2, 1939, The City Ice & Fuel Company deposited a check for $25,000 with the Riverview State Bank of Kansas City, Kansas, to guarantee loans made to produce dealers at the Kansas City Food Terminal.[1] The ostensible arrangement between The City Ice & Fuel Company and the Riverview State Bank is expressed in correspondence exchanged by the parties between December 1 and December 15, 1939. Briefly stated, it was understood that a fund of $100,000 was to be created, of which $25,000 was to be contributed by The City Ice & Fuel Company and the remaining $75,000 by the Riverview State Bank, out of which fund loans would be made to tenants of the Kansas City Food Terminal; that the agreement would run for one year; that the bank would have full discretion in passing on credits and making loans; and that any losses which might result from such loans would be met first out of the $25,000 deposited by The City Ice & Fuel Company.[2]

Based upon the $25,000 guaranty fund, the Riverview State Bank made loans to produce dealers totaling $95,748.16, of which $13,915.44 has been repaid, leaving a balance of $81,832.72 as of February 8, 1940.[3] The following loans were made to defendant produce dealers:[4]

Name	Amount
Harry Robinson and A. Robinson & Sons Fruit Co.	$10,874.18
Baum Fruit & Produce Co.	3,000.00
H. Winer Produce Co.	8,500.00
Sarser Produce Co.	5,000.00

[1] R. 521.
[2] Ex. 71, R. 2738.
[3] R. 656.
[4] R. 651-656.

Name	Amount
Litman Produce Co.	15,000.00
Watrous & Sons	1,500.00
A. Feinberg & Sons	2,500.00
Lombardo Produce Co.	600.00
Market Produce Co.	1,000.00

The dealers were referred to the Riverview State Bank for these loans [1] and the bank thereafter made loans totaling approximately $95,000 as above stated. Many of these loans were entirely unsecured.[2] Two of the loans were made under circumstances indicating that they were not to be repaid by the borrowers; each of these loans was made in the amount of $5,000 to a member of the merchants committee formed by DeOreo and Fean in 1937 to assist in inducing produce dealers to move to the new terminal. The members of the committee had been promised $5,000 each for their services and for moving to the terminal.[3] Mr. Stanley from the very beginning, worked closely with this committee,[4] and he knew about the arrangement to pay the committee members, promising one of them that "he was going to see that Joe would pay us."[5] One of these unsecured loans was made to Harry Robinson who was then insolvent and who had shortly before made an assignment for the benefit of his creditors.[6] The other unsecured loan went to Ike Sarser, another committeeman.[7] Sarser does not find it necessary to borrow money to carry on his business, never having contracted a bank loan before or since.[8]

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[1] Fdg. 24, R. 355.
[2] R. 651-656.
[3] R. 652, 654, 620-621; Ex. 86, R. 2757.
[4] R. 596-597.
[5] R. 605.
[6] R. 652, 653, 586.
[7] R. 654-655.
[8] R. 1255.

Manifestly, he did not secure this so-called loan in the ordinary course of his business but in discharge of the obligation to pay him for his services to DeOreo, Fean, the Union Pacific and the City.

Another produce dealer, Sam Litman, was informed that he could borrow only $15,000 all told [1]—practically the amount of the cash bonus which the principal defendant had agreed to pay him to move to the new terminal.[2] He was given a loan of this $15,000 without security.[3]

Many other loans without collateral or security of any kind were made to produce dealers. A loan of $3,000 was made to Louis Gordon, an insolvent produce dealer, the loan being promised to him by Mr. Stanley as an inducement for his moving to the new terminal.[4]

Watrous and Sons was given an unsecured loan of $1,500;[5] A. Feinberg & Sons, one of $2,500;[6] Lombardo Produce Company, one of $600;[7] and Market Produce Company, one for $1,000.[8]

The appellants call attention to the finding of the court that these "unsecured or inadequately secured loans although offered * * * were never made by the bank.[9] They construe this as a finding that there was nothing illegal about the loans, but this particular finding must be read in conjunction with the other findings [10] and with the passages in the opinion below [11] dealing with these loans. The court found that the offers were made by Mr. Stanley [12] that

[1] R. 553.
[2] R. 2675.
[3] R. 553, 655.
[4] R. 656, 1259-1263.
[5] R. 655.
[6] R. 656.
[7] R. 656.
[8] R. 656.
[9] Fdg. 20, R. 353.
[10] Fdgs. 19-20, R. 351-354.
[11] R. 258-259.
[12] Fdgs. 19-20, R. 351-353.

the loans were made by the bank; and for the future it enjoined the offering or giving of "unsecured or inadequately loans constituting concessions."[1] All that the court was attempting to do was to avoid a finding which would render all of the loans uncollectible because of a taint of illegality.

But the chief defect in appellants' argument is that it overlooks the necessity of adequate security for a loan made to a shipper with respect to transportation if a rebate, concession, advantage, or discrimination is to be avoided. It is not enough that the loan be made at six per cent and with the intention that it be repaid. It must also be adequately secured; for if it is not, the shipper receiving the loan is given an advantage, and something of value not covered by the alleged promise to repay with interest at six per cent.

These loans were not justified by the ordinary commercial relations between borrower and lender. They would not have been made if such considerations had been permitted to govern. The proof of this is that the Riverview State Bank was unwilling to take the risk but made the loans only because of the guarantee provided by The City Ice & Fuel Company. The guarantee was necessary because the alleged promise of the borrowers to repay the loans with interest at six per cent was not a commercially adequate consideration for making the loans. Favors of this or any other sort extended to a shipper by a railroad or those acting in concert with it are in violation of the Interstate Commerce and the Elkins Acts.[2]

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[1] R. 378.

[2] As stated by the Supreme Court in *United States* v. *Union Stock Yard and Transit Co.* (1912), 226 U. S. 286, 309:

"* * * It is the object of the Interstate Commerce Law and the Elkins Act to prevent favoritism by any means or device whatsoever and to prohibit practices which run counter to the purpose of the act to place all shippers upon equal terms."

III.

All of the Concessions Offered or Given to Shippers Were Gifts or Gratuities and, therefore, Unlawful if with Respect to Transportation.

The argument by which the appellants seek to show that the court below erred in holding that both of them had offered or given rebates and concessions prohibited by statute really narrows down to four propositions:

1. Only the City offered or gave concessions.

2. The City is not subject to the Federal Statutes against rebates and concessions.

3. The Union Pacific neither offered nor gave any concessions but merely rendered incidental assistance to the City in doing what it lawfully might.

4. None of the concessions were in respect to transportation but were offered or given solely in respect to the operation of the City's public market.

The first and third of these propositions are refuted by the findings of the District Court and the evidence supporting them which have just been reviewed in the preceding point—including the contention which seems to be implicit in the appellants' argument, namely that the Union Pacific officers and agents, in conferring with the shippers, confined themselves strictly to developing facts for the information of the City and refrained entirely from making any offers which would come under the purview of the statutes. The question whether the concessions were in respect to transportation is a mixed question of law and fact which is considered in some detail later on in this brief. The question whether the City is subject to the acts regulating interstate commerce is entirely one of statutory construction. While the appellants do not seriously deny that any gifts or gratuities offered or given to shippers by the Union

Pacific would be unlawful, they seem to insist that before any offer or gift may be considered within the prohibition of the statute, the railroad must have the legal title to the property, or the money so offered or given must be shown to come directly from the railroad treasury. But neither this nor the other legal defenses raised by the appellants can be sustained.

The Interstate Commerce Act requires the publication of every rate charged by a common carrier for the transportation of property and strict adherence to the tariffs so published. It forbids the carrier to refund or remit in any manner or by any device any portion of the rates so specified.[1] It prohibits any carrier from giving any unjust discrimination,[2] undue preference, or undue prejudice.[3] It specifically provides that the discrimination may not be effectuated "directly or indirectly by any special rate, rebate, drawback, or any other device."[4]

The Elkins Act, an amendatory and supplementary statute passed in 1903 for the specific purpose of more effectually eradicating favoritism in the transportation field, requires the carriers "strictly to observe • • • tariffs until changed according to law," and provides that "it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive, any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier • • • whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier."[5]

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[1] Interstate Commerce Act, Section 6(7), 49 U. S. C., 6(7).
[2] Id., Section 2.
[3] Id., Section 3.
[4] Id., Section 2.
[5] Section 1 of the Elkins Act, 49 U. S. C., 41(1).

This Court has repeatedly held that the purpose of the two Acts was to cut up by the roots every form of discrimination, favoritism, and inequality,[1] and it has emphasized that the object is "to prevent favoritism by any means or device whatsoever, and to prohibit all practices which run counter to the purpose of the act to place all shippers upon equal terms."[2] The defenses which appellants raise about the legal title to the money and the rental properties at the time the concessions were offered or given can avail nothing in the face of statutes expressly, framed to cut through the form to the substance, which outlaw what is accomplished indirectly or by some subterfuge or device equally with what is accomplished directly.

There is no merit in the contention of the appellants that the Elkins Act does not apply to the City. It would seem to be clear beyond doubt that when Congress says, as it does in this statute, that it shall be unlawful for any person, persons or corporation to engage in rebating transactions, it means just exactly what it says and the ban extends to any such person and not merely to carriers and shippers. These terms are broad enough to include the City as a municipal corporation and all of its officers and agents. A State of the Union may be and frequently is within the meaning of the word "person" as used in Federal Statutes.[3] A State is within the definition of the term "common carrier" in the Interstate Commerce Act and the Safety Appliance Act.[4]

Quite true, in the penalty clause of the Elkins Act the language used is "every person or corporation, whether

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[1] *United States* v. *Koenig Coal Co.* (1926), 270 U. S. 512, 519.

[2] *United States* v. *Union Stock Yards and Transit Co.* (1912), 226 U. S. 286.

[3] *Ohio* v. *Helvering* (1934), 292 U. S. 360, 370-1; *In Re Western Implement Co.*, 166 F. 576-582; see also *Stanley* v. *Schwalby*, 147 U. S. 508, 517.

[4] *United States* v. *California* (1936), 297 U. S. 175, 185; *California Canneries Co.* v. *Southern Pacific Co.*, 51 I. C. C. 500, 502, 503; *United States* v. *Belt Line R. Co.*, 56 I. C. C. 121; *Texas State Railroad*, 34 I. C. C. Val. R. 276.

carrier or shipper, * * *" but the phrase "whether carrier or shipper" was not intended to restrict the all-embracing scope of the preceding terms. It was not included at all in the Elkins Act as originally passed in 1903.[1] It was introduced by an amendment made by the Hepburn Act of 1906 under circumstances clearly indicating that it was merely for the purpose of giving double assurance of the inclusion of shippers as well as carriers.[2] President Roosevelt had recommended that the Hepburn Act include provisions "putting a complete stop to rebates in every shape and form,"[3] and the changes in the Elkins Act were made by Congress to carry out this purpose.[4]

The theory that the addition of the words "whether carrier or shipper" was intended as a limitation is tenable only upon the assumption that Congress did not intend to outlaw all rebates, but only those arranged for entirely by carriers and shippers and intended to leave third persons free to carry out devices for rebates with respect to transportation. It is tenable only on the further assumption that Congress, after having prohibited in the Act of 1903 rebates by any person, persons or corporation, intended to create an exception in favor of third persons by introducing the words "whether carrier or shipper" in the Act of 1906. Both assumptions are in direct conflict with the language of the statute as amended and with the known legislative purpose in the enactment of the two statutes.

This Court has held in passing on an analogous question involving the construction of the same statute that it must be construed to include acts coming within the literal wording when they clearly effect discrimination and inequality.[5]

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[1] 32 Stat. L. 847.

[2] Hepburn Act, 34 Stat. L. 587-8.

[3] Message of President Roosevelt to Congress, No. 1242, 59th Congress, First Session, March 15, 1906.

[4] House Report No. 591, page 3, 59th Congress, First Session, January 27, 1906. Senate Report, 59th Congress, First Session, 1906.

[5] *United States* v. *P. Koenig Coal Co.*, 270 U. S. 512, 519, 529.

While this court has never passed upon the precise question whether the Elkins Act covers third persons as well as carriers and shippers, it has nevertheless referred to the prohibition of the statute as extending to any person or corporation.[1] The precise question, however, has been uniformly decided in the affirmative by the lower federal courts. In every case where the contention made here by the appellants has been raised it has been specifically rejected. In these cases the courts have uniformly held that the prohibition of rebates extends to any person or corporation and not merely to a carrier or shipper.[2]

The principal reason, apart from the discrimination involved, why the concessions in the present case are unlawful

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[1] For instance in *Armour Packing Co.* v. *United States* (1908), 209 U. S. 56, the court said at page 71:

"In this act we find punishment by imprisonment abolished, and the shipper and carrier are placed upon the like footing, and it is made unlawful for *any person or corporation* to offer, grant, solicit, give, or to accept or receive, any rebate, concession or discrimination in respect to transportation of property in interstate or foreign commerce, whereby any such property shall, by any device whatever, be transported for a less rate than that published and filed by such carriers, or whereby any other advantage is given or discrimination practiced." (Italics ours.)

In *United States* v. *Union Stock Yard* (1912), 226 U. S. 286, the court said at page 308:

"The Elkins Act makes it an offense for *any person or corporation* to give or receive any rebate, concession or discrimination in respect to the transportation of property in interstate commerce whereby any such property shall be transported at a rate less than that named in the published tariff or whereby any other advantage is given or discrimination is practised." (Italics ours.)

[2] *Spencer Kellogg & Sons* v. *United States* (C. C. A. Second, 1927), 20 F. (2d) 459; certiorari denied, 275 U. S. 566. *United States* v. *Miller* (D. C., 1937), 18 Fed. Supp. 389. *Interstate Commerce Commission* v. *Reichman* (D. C., 1906), 145 Fed. 235. *United States* v. *Milwaukee Refrigerator Transit Co.* (C. C., 1906), 145 Fed. 1007. *Dye* v. *United States* (C. C. A., 1919), 262 Fed. 6.

The decision of the Commerce Court in *United States* v. *Union Stock Yard & Transit Co.* (1911, 1912), 192 Fed. 330, is not to the contrary. The court expressly held at pages 343 and 349 that the question was not involved. Moreover, the decision of the Commerce Court was reversed on other grounds by this Court. *United States* v. *Union Stock Yard & Transit Co.* (1912), 226 U. S. 286.

is because they represent in substantial part either a gratuity or a consideration for the traffic of the shipper, both of which are illegal. Neither a carrier, an owner of railroad facilities, nor any other person may give to a shipper any gratuity with respect to transportation by a common carrier, because it operates to diminish the freight charges which the shipper is called on to pay under the published tariffs. The outright purchase of traffic is open to the same objection. This is well illustrated by the decision of this Court in *Lehigh Valley R. R. Co.* v. *United States*,[1] where it condemned an arrangement whereby the railroad paid a salary of $5,000 a year and certain commissions to a freight forwarder for routing traffic over the railroad's line, the Court holding that any payment made by a carrier to a shipper in consideration of his shipping goods over the carrier's line comes within the prohibiting words of the statute.

Just as the rebate or concession may not be paid directly, just as the traffic may not be purchased directly, so it may not be purchased indirectly or by any subterfuge or device. The same result may not be accomplished under some other guise, under cover of compensating the shipper for some transportation service or facility which he furnishes, paying claims for loss or damage, conducting business deals with him ostensibly outside of the field of transportation. If in any of these ways what the shipper receives exceeds the value of what he gives in return, it is but an indirect means of paying for his traffic.

The Union Pacific or the City has the right to conduct any form of ordinary commercial business with shippers so long as the dealings are not used as a cover for buying traffic. There is no violation of the law when the railroad or the City receives in these transactions a full *quid pro quo* for

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[1] 243 U. S. 444 (1917).

what it gives. When the considerations balance, then no exception may be taken It is only where a full *quid pro quo* is not received, only where the considerations fail to balance, that the transaction becomes questionable and when the difference between what has been received and what should have been received is found to be a gratuity, and, when given with respect to transportation, to be an unlawful rebate or concession.[1]

The payment of a cash bonus to a shipper for locating on a carrier's line—which is what was enjoined here—is unlawful.[2] Giving to shippers the use of property free or at inadequate rentals is likewise unlawful.[3] Advertising given free to individual shippers is likewise unlawful.[4] Unsecured loans made to or arranged for a shipper, not justified by the ordinary commercial relations between borrower and lender, necessarily involve favoring him with an advantage or concession and are unlawful for the same reason as loans made at less than the going market rate of interest.[5]

The Elkins Act expressly outlaws every step in any transaction with respect to rebates, concessions, advantages and discriminations, condemning each of them as a separate of-

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[1] *Baltimore & Ohio R. R. Co.* v. *United States* (1939), 305 U. S. 507. *Mitchell Coal Co.* v. *Pennsylvania R. R. Co.* (1913), 230 U. S. 247, 262-5. *Tap Line Cases* (1914), 234 U. S. 1, 29. *Manufacturers Ry. Co.* v. *United States* (1918), 246 U. S. 457, 486-7.

[2] *United States* v. *Union Stock Yard & Transit Co.* (1912), 226 U. S. 286, 308-9.

[3] *Baltimore & Ohio R. R. Co.* v. *United States* (1939), 305 U. S. 507. *Cleveland, C., C. & St. L. Ry. Co.* v. *Hirsch* (C. C. A. Sixth, 1913), 204 Fed. 849. *Northern Central Railway Co.* v. *United States* (C. C. A. Second, 1917), 241 Fed. 25, 30-31. *Central of Georgia Railway Co.* v. *Blount* (C. C. A. Fifth, 1917), 238 Fed. 292. *Leases and Grants by Carriers to Shippers* (1922), 73 I. C. C. 671.

[4] *Use of Privately Owned Refrigerator Cars* (1934), 201 I. C. C. 323, 381-2.

[5] *Vandalia R. Co.* v. *United States* (1915), 226 Fed. 713. *Southwestern Lumber Company* v. *Kerr* (D. C. 1934), 11 Fed. Supp. 253; (C. C. A. 5th, 1935), 78 Fed. (2d) 348, is not to the contrary. No question of unsecured or inadequately secured loans was there involved.

fense. The statute specifically makes it illegal to: (1) offer, (2) grant, (3) give, (4) solicit, (5) accept, or (6) receive, any concession. Any one of these six acts, when done by a carrier or a shipper or any other person, is a distinct and separate violation of the law.[1]

The term "offer", as used in the statute, is employed in its ordinary every-day usage rather than in the strict sense used in the law of contracts. To offer a concession it is not necessary to make a definite proposition to a shipper in such a way as to result in a contract upon acceptance. To offer is among other things, "to bring forward or into notice in general";[2] "to give or present in general";[3] "to hold out, tender, proffer, as to offer a bribe."[4] It has been held that the word "offer" has no meaning in law different from its ordinary and general meaning.[5] The term "offer", as used in a statute making it a felony to offer a bribe to an executive officer, means a proposition to do a thing, to hold out, to proffer, to make a proposal to; and, hence, the crime of offering to bribe is complete without any tender or production of the money offered.[6] In a prosecution for violation of a statute punishing every person attempting to corrupt a juror by offering to give any gift with intent to bias a juror, it is not necessary to prove an actual tender so as to enable the juror to accept or reject it at once. Evidence showing a proposal to give a bribe to bias the juror's verdict is sufficient.[7] There is an even

[1] *Armour Packing Co.* v. *United States* (1908), 209 U. S. 56, 69-72; *United States* v. *Koenig Coal Co.* (1926), 270 U. S. 512, 519-20; *United States* v. *Altman* (D. C., 1934), 8 F. Supp. 880, 882.

[2] Funk and Wagnall's New Standard Dictionary of the English Language, 1940.

[3] Webster's New International Dictionary of the English Language, 1933.

[4] Id.

[5] *Texas Pipe Line Co.* v. *Miller* (Tex.), 84 S. W. (2d) 550, 552.

[6] *People* v. *Ah Fook*, 62 Cal. 493, 494.

[7] *State* v. *Woodard* (Mo.), 81 S. W. 857.

See also: *Johnson* v. *State* (Mo.), 92 S. W. 257; *State* v. *Armigo*, 142 P. 1126 (N. M.); *State* v. *Miller* (Mo.), 81 S. W. 867; *Commonwealth* v. *O'Brien*, 164 Atl. 300, 107 Pa. Sup. 569; *Palliser* v. *United States*, 136 U. S. 256.

stronger reason here for rejecting the appellants' theory that due formality must attend an offer before it may be regarded as illegal under the Elkins Act. The statute not only prohibits offers of concessions where they are made directly, but also where they are made indirectly, "by any device whatever." The law was passed to reach the very forms of indirection which the Union Pacific officials used and upon which they still pin their hopes. Congress knew that when an unlawful offer is made it is more often than not made indirectly and furtively rather than directly and openly; and therefore there is no escape from the prohibitions of the statute by the employment of devious methods.

What Mr. Stanley and Mr. DeOreo did, even under the view of the evidence most favorable to them, was to hold out the prospect of concessions as an inducement for the shippers to move to the Kansas City Food Terminal, and this is an offer within the meaning of the term in the Elkins Act. It is immaterial where the money or goods to be used in making payment was to come from—the statute prohibits the offering of any inducement in respect to transportation and contains no qualification with regard to the source of the payments. In fact, however, real promises were actually given,[1] and so strong and compelling were they that as already shown most of the produce dealers moved to the new terminal solely in reliance upon them.

IV.

All Concessions Here Were With Respect to Railroad Transportation.

The next inquiry is whether the concessions in this case were, in the language of the statute, "in respect to the transportation of any property in interstate or foreign commerce by any common carrier" within the purview of

[1] Payne, R. 679.

the federal statutes regulating interstate commerce.[1] Were the concessions in whole or in part in respect to the transportation of fresh fruits and vegetables in interstate commerce by the Union Pacific Railroad, a common carrier, regulated by those acts, or were they entirely in relation to a different subject matter?

This question must be answered with regard to all of the concessions, including not only those offered or given by the Union Pacific ostensibly on behalf of the City but also those which it offered or gave practically without reference to the City. In the first group are most of the cash concessions and all of the rental concessions, while in the second group are some of the cash concessions, the free advertising, free trips, and unsecured or inadequately secured loans.

The District Court held that all of the concessions were offered or given with respect to transportation.[2] The appellants however, contend that the Court was wrong, strenuously insisting that the concessions in the first group were offered or given solely in respect to the establishment and operation of the City's so-called public market facilities and not at all in respect to transportation. When they do not deny the existence of the concessions in the second group they ignore or slur over them. They apparently contend that the loans were not given in respect to transportation but with respect to the interests of the Riverview State Bank and The City Ice and Fuel Company in a successful produce terminal in Kansas City, Kansas. These contentions are without support either in the evidence or in the law.

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[1] The language quoted is from Section 1 of the Elkins Act, 49 U. S. C. 41(1).

[2] Conclusions of law, Nos. 2, 3, 4, 5, 6, and 7, R. 366-9; Opinion below, pp. 15-18, R. 254-7.

1. *Any Concession to Procure Traffic for a Railroad or a Rail Transportation Facility is in Respect to Transportation.*

Before discussing the evidence in support of the findings of the District Court it may be well to clarify and define the meaning of the phrase "in respect to the transportation of any property in interstate or foreign commerce by any common carrier" found in the Elkins Act. Its proper interpretation has been considered in many cases.

In every decision cited by any of the parties in this case where a gratuity is found to have been given by a railroad or an owner of transportation facilities to a shipper, the court has held that the gift was made to obtain the shipper's traffic or, in other words, given in respect to transportation. A railroad does not commonly engage in spreading gifts without hope of return; where it is found making gifts to a shipper, a very strong inference arises that they are given to secure the shipper's traffic. In *Baltimore & Ohio R. R. Co.* v. *United States,*[1] one of the questions was whether commercial warehousing furnished by railroads to shippers at less than cost was with respect to transportation. It appeared that some of the carriers had aided in financing the warehouses, and all of them exercised sufficient control over the warehouse facilities to make them subservient to their competitive needs. Their entrance into the business of warehousing was brought about by the desire to attract patronage for the particular railroad serving the warehouses. Railroad representatives became rental solicitors for warehouse space.[2] This Court held that since the rental

[1] 305 U. S. 507 (1939).

[2] The Court, in describing the activities of the New York carriers in making warehouse space available to shippers, said, at pages 516-17:

"* * * The warehousing practices complained of are those in connection with accessorial services of the carriers, accurately designated commercial warehousing. * * * This business is carried on in various ways. Some carriers lease space to shippers for warehousing; others have aided in

concessions were made in an effort to acquire rail traffic they were in respect to transportation and therefore illegal.[1]

In *Vandalia R. Co.* v. *United States*,[2] the railroad company attempted to justify the transaction whereby it borrowed money at four per cent and lent it to the mining company at two per cent by saying that the real consideration for this favorable treatment of the shipper was not its traffic

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financing structures on their property in which they lease space from their own subsidiaries; and still others own directly the buildings and lease them to subsidiaries for warehouse operations. In all cases the carriers exercise sufficient control over the warehouse facilities to make them subservient to the competitive needs of the carriers. Their entrance into warehousing was brought about by a desire to induce shippers to use particular rail facilities and as first one and then the other of the carriers gained traffic by their warehouse conveniences, it seemed necessary for their competitors to equip themselves with similar advantages. Obviously a shipper, who can secure transportation, storage, handling and insurance together from a carrier and its affiliates for an aggregate cost which is less than the sum for which he can secure the various services when purchased separately from carriers and non-affiliated enterprises, will deal with those offering the best terms. The storage largely determines the transportation route. To get the rail transportation of large shippers, the carriers sought them out and offered warehousing services and space below the rates of private warehousemen and below the cost to the carriers of the services rendered. It was not only a contest between carriers and private warehousemen but also between the carriers themselves. Traffic departments of the railroads became solicitors for warehousing business. Favored shippers were rented space by the carriers below compensatory figures. To meet the requirements of this competition the various Port of New York railroads added many new buildings in recent years. This provided many millions of square feet of space above the present needs of the district."

[1] The Court said, at p. 524:

"When services, not necessary for transportation, are furnished below cost in an effort to acquire rail transportation, as was done here, this provision is violated. * * * The rail transportation rates have charged against them the loss occasioned by warehousing practices designed to attract a volume of rail business."

Again, the Court said at p. 526:

"* * * If the service is non-transportation, the fact that it is in a tariff does not save it from the condemnation of § 6 (7). That section forbids receiving a less compensation for transportation than the tariff. The loss on in-transit warehousing, entered into to secure the rail-haul, results in lowered receipts for the transportation and in violation of the section."

[2] 226 Fed. 713 (C. C. A. 7th, 1915, certiorari denied, 239 U. S. 642).

but the advantage accruing to the railroad from an agree ment by the coal company to sell it coal at a specified price which would prevent other coal miners in the vicinity from combining to raise the price of coal for locomotives. The Court held, however, that the jury in the trial court was justified under the evidence in regarding this supposed ad vantage as either so slight in value or so altogether value less as to render it a mere subterfuge for giving a rebate in order to secure the shipper's traffic.[1]

It is unnecessary that the sole purpose of the concession should be to secure the shipper's traffic. It suffices if part of the purpose is to get traffic. Thus, in *United States* v *Union Stock Yard & Transit Co.*,[2] part of the purpose in giving the bonus had nothing to do with railroad traffic; it was concerned with the location of the packing plant near

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[1] The Court said, at page 717:

"It is contended, however, that there were other considerations given by the Coal Company in addition to the exclusive tonnage; that the burden of proof is on the government to establish that these other considerations were not worth the entire difference between the 2 per cent and the market rate of interest; and that the government has failed to make any such proof. Specifically, the defendant claims that the agreement to furnish coal at $1.20 a ton, subject only to the change in the wage scale and mining scale, was a consideration of great value. The implication is that the jury was bound, in the absence of direct proof, to consider that this value exceeded what would otherwise have been a rebate. The jury, however, were not without evidence tending to show the very slight value of this alleged insurance against a combination of dealers to raise the price of coal to the railroad. The fact that the company was actually paying $1.10, and not the stipulated price of $1.20, at the time the contract was made; the further fact that the company had never had any actual difficulty in getting coal at the market price, in themselves would have justified the jury in regarding this clause as a mere subterfuge, and of no value whatsoever.

"The other alleged advantages to the railroad might well have been deemed either offset by the advantages to the other parties, as shown by the contract, or of no substantial value whatsoever. We conclude, therefore, that the evidence fully sustains the charge that the defendant knowingly gave a rebate in respect to the interstate transportation whereby such property was transported at a less rate than that named in the tariff."

[2] 226 U. S. 286 (1912).

the stock yards, and with the requirement that the packers should patronize it, availing themselves of its non-carrier services. It was shown that competing stock yards engaged in the practice of offering similar inducements to packing houses and other industries to locate near their yards, indicating that the bonus was paid in accordance with a customary practice of the trade. But because part of the purpose was to secure the traffic of the packer in connection with the common carrier operations of the Stock Yard Company and the Junction Company, the bonus was held to have been given with respect to transportation.[1]

In *Central of Georgia Ry. Co.* v. *Blount, et al.*,[2] the Court held that where the controlling, substantial purpose of giving premises rent free to the shipper is to secure his traffic,

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[1] The Court described the business carried on by the Stock Yard Company, at p. 300, as follows:

"After leasing its railroad property to the Junction Company, the Stock Yard Company continued to operate its stock yard facilities for loading and unloading cattle and other live stock bound for and coming from points outside the State, and to feed and water live stock in transit over the lines of trunk line carriers, and also to feed, bed and water live stock shipped to consignees doing business in the stock yards district."

At page 302 the Court described the purpose for which the bonus was given, saying:

"* * * the Pfaelzers agreed that all live stock slaughtered or canned by them within a radius of 200 miles would either be purchased at such stock yards or pass through and use them, the customary yardage, tolls and charges to be paid thereon, or that the Pfaelzers would pay full tolls and charges on live stock the same as if it had been sent to the stock yards for sale and had there been bought by them; and that for fifteen years they would conduct all their slaughtering, packing and canning business at such plant and not interest themselves directly or indirectly in any other plant or in any other stock yards. * * *

"It is stated in the answer of the Stock Yard Company and stands admitted in the case that there are other competitive stock yards in the United States which have built up their business in competition with it by offering and giving inducements, either in the shape of land or money, to packing houses and other industries to locate at or near their yards."

[2] 238 Fed. 292 (C. C. A. 5th, 1917).

the concession is with respect to transportation and therefore unlawful.[1]

It follows that where concessions are given to secure traffic for an operating railroad they are "in respect to transportation," as that term has been construed by this Court and by the lower Federal courts. Concessions given to secure traffic for any transportation facility have been held to fall within the same category. In *Spencer Kellogg & Sons* v. *United States*[2] the concession was given not by a railroad for the purpose of increasing its traffic but by an operator of an elevator engaged in transferring grain from shipboard to railroad cars. One of the grounds for sustaining the conviction was that the concession was paid to secure an increased volume of business for the elevator which, while so used, was a facility of transportation.[3] The same holding was made in *Interstate Commerce Commission* v. *Reichmann*,[4] where the concessions were given to

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[1] The Court said, p. 296:

"* * * The whole tenor of the lease leaves no room for reasonable doubt that the provisions of it looking to the bringing about of a continued preferential treatment of the lessor by the tenant in the matter of the shipment of freight constituted, if not the sole, at any rate the controlling, substantial inducement to the lessor for allowing its land to be occupied and used without the payment of rent. Nor is it to be doubted that to the extent that the tenant escaped the payment of a reasonable adequate rental there was a deduction from the sum of the tariff rates paid on shipments of freight to and from it over the lessor's railway."

[2] 20 Fed. (2d) 459 (C. C. A. 2d, 1927, certiorari denied, 275 U. S. 566).

[3] The Court said, at p. 461:

"* * * This plaintiff in error, in using its elevator for transportation, performed transportation services, and effectuated the through movement of interstate shipments of grain. It was engaged in interstate traffic. *Southern Pac. Terminal Co.* v. *Int. Com. Comm.*, 219 U. S. 498, 31 S. Ct. 279, 55 L. Ed. 310; *B. & O. S. W. R. R.* v. *Settle*, 260 U. S. 166, 43 S. Ct. 82, 67 L. Ed. 189. The motive in paying rebates was to increase the volume of business which passed through its elevator and to add to its income."

[4] 145 Fed. 235 (C. C., 1906).

increase the business of a company renting stock cars to a railroad, the stock cars being facilities of transportation.[1]

No break in the connection of the concessions in the case at bar with transportation is occasioned by the fact that they were not paid to the shippers with respect to any specific shipment of fruits and vegetables or immediately before or after such shipment. As this Court said in *Baltimore and Ohio R. R. Co.* v. *United States*,[2] "a saving on the non-transportation services obviously figures out the same as a rebate on the transportation service."[3]

Anything of value given directly or indirectly or by any device to the shipper without an adequate consideration in return likewise figures out the same as a rebate directly paid on a particular shipment. "Any payment made by a carrier to a shipper in consideration of his shipping

[1] The Court said, at pp. 240-241:

"Indeed, the very purpose of the payment by the car company is to place the shipper in a position of preference, and thereby to induce him to require the carrier to furnish Street's cars for his future shipments, on which, presumably, he would receive like payments from the car company, thus securing to him a continuing financial advantage not contemplated by the regular tariff. Does the language bear this construction? Is it the deliberately expressed intention of Congress, in this legislation enacted to preserve the integrity of the published rate, that the rate may be varied by some intervening or cooperating or subserving agency, or is it the expressed intention that nobody may do what a carrier is forbidden to do? * * * Do the words, 'it shall be unlawful for any person, persons, or corporation to offer, grant, or give * * * any rebate, concession, or discrimination * * *' prohibit a private car company from paying money to a shipper 'in respect of the transportation of his property' by a common carrier in cars belonging to the car company? Such payment is not merely 'in respect of such transportation,' but it is in consideration of such transportation. And that it would be a concession or discrimination which would operate to give the fortunate payee an advantage, by reducing his freight account below the regular rate, is obvious."

[2] 305 U. S. 507, 523 (1939).

[3] Or, as the lower court said in the same case, to the extent that the cost of providing the commercial warehouse service is not returned, "the tariff rates for the transportation are in effect reduced as much as though a rebate to such shippers to the amount of the carrier's loss had been paid."—*Baltimore and Ohio Railroad Company* v. *United States* (D. C., 1937), 20 F. Supp. 273, 277.

goods over the carrier's line comes within the prohibiting words."[1] It is equally unlawful, whether made in a cash sum in advance or by later or earlier indirect payments.[2]

The question whether the concessions in the case at bar were made in respect to transportation may therefore be answered by determining whether they were made for the purpose of securing traffic either for an operating railroad or for the owner of a transportation facility. The lower court answered these questions in the affirmative. It found as a fact that the concessions were made for the purpose of procuring traffic for the Union Pacific and for the Kansas City Food Terminal.[3] It further found that the Union Pacific's purpose in engaging in the terminal project was to divert from competing railroads produce traffic moving from the West into Kansas City,[4] and, accordingly, the Union Pacific arranged with the cooperation of the City that it should, with one rather unimportant exception, operate all railroad service at the terminal.[5]

2. *The Union Pacific's Motive Was to Increase its Rail Traffic.*

Since motive is usually an important factor in determining the character of an act, the first inquiry is what were the motives behind the concessions.

Beyond doubt, the ever-present and dominating motive of the Union Pacific in every phase of the promotion of the new terminal was to increase its perishable produce

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[1] *Lehigh Valley R. Co.* v. *United States*, 243 U. S. 444, 446 (1917).

[2] *United States* v. *Union Stock Yard & Transit Co.*, 226 U. S. 286 (1912); *Vandalia R. Co.* v. *United States*, 226 Fed. 713, 716 (1915, C. C. A. 7th); *Grand Rapids and Indiana R. Co.* v. *United States*, 212 Fed. 577 (C. C. A. 6th, 1914, certiorari denied, 234 U. S. 762).

[3] Findings of Fact 18-23, 28, R. 350-54, 357-8.

[4] Finding of Fact, R. 358.

[5] Findings of Fact 8, 31, R. 342, 358.

traffic moving from California and other western states to Kansas City. It was the motive behind every phase of its activities, including the offering and giving of the concessions. There can be no doubt about the existence of this motive. It was affirmed time and time again by statements in writing of the higher Union Pacific officials. The location of the terminal on its line at Kansas City, they said, "would be a matter of utmost importance to the Union Pacific."[1] The terminal was expected "to centralize all of the perishable business on this property * * *. The traffic will be well up in the thousands of cars."[2] It was expected to "be a very substantial revenue traffic producer, and I think that we are warranted in giving it our full support."[3] "All of these terminals illustrate a very substantial traffic advantage to the line on whose rails they are located."[4] "We do know that at other places adequate and efficient facilities with a successful market have increased traffic to the lines serving the terminal."[5] "There is no available project at Kansas City of greater importance to us."[6] "This is a project of such magnitude and is of so great a traffic advantage to the Union Pacific that I believe we are warranted in advancing the money."[7]

The Union Pacific officials very evidently regarded the cash bonuses and rental credits as essential to the achievement of the objective of increasing the railroad's traffic. They made this clear in letters and telegrams, written while they were "very much occupied with last minute negotia-

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[1] Stanley to Haugh, December 23, 1936, Exhibit 2, p. 10, R. 1490-92.
[2] Haugh to Gray, January 15, 1937, Exhibit 2, p. 17, R. 1496-7.
[3] Haugh to Stanley, January 21, 1937, Exhibit 2, p. 23, R. 1501-2.
[4] Haugh to Gray, May 3, 1937, Exhibit 2, p. 42, R. 1515.
[5] Robinson to Haugh, June 7, 1937, Exhibit 2, p. 52, R. 1524.
[6] Stanley to Haugh, July 1, 1937, Exhibit 3, p. 4, R. 1537.
[7] Jeffers to Charske, February 19, 1938, Exhibit 4, p. 22, R. 1570.

tions with members of the trade."[1] Mr. Haugh characterized the cash and rental adjustments as very important in one of his reports to Mr. Jeffers.[2] The next day he reported that "when we get this particular behind us we can make better progress."[3] The desire for traffic and more traffic was assuredly the motive of the Union Pacific officials in carrying on the negotiations with the shippers and arranging for the giving of the benefits. To contend otherwise is to ignore the forces which motivate human conduct.

3. *The Necessary Result of Concessions Would be to Increase Union Pacific Traffic.*

When the produce dealers, persuaded by the concessions offered or given, moved to the new Kansas City Food Terminal, the effect was necessarily an increase in the traffic and revenues of the Union Pacific. The old produce district in Missouri, while served by all of the major roads bringing perishable traffic in from the West, was, nevertheless, immediately reached by none of them, but only by the Kansas City Southern, a line running from Kansas City south to the Gulf of Mexico.[4] The new Kansas City Food Terminal, on the other hand, is not only on the line of the Union Pacific, but is also served by rail exclusively[5] by the Union Pacific. The Union Pacific operates the rail facilities of the terminal, the cars of freight being

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[1] Weedin to Robinson, November 30, 1939, Exhibit 16, p. 4, R. 2033.

[2] "General situation now appears more favorable than at any time as to allowing adjustments which are very important. We are working all possible to conclude adjustments before Saturday."—Haugh to Jeffers, December 8, 1939, Exhibit 12, p. 17, R. 1775.

[3] Haugh to Jeffers, December 9, 1939, Exhibit 12, p. 19, R. 1777.

[4] Haugh, R. 1097.

[5] This is subject to one relatively unimportant exception. The Missouri Pacific serves the cold storage plant of the terminal jointly with the Union Pacific. Finding of Fact 8, R. 342.

handled by Union Pacific locomotives and crews, and the whole thing being under Union Pacific supervision. Every carload of freight moving in or out of the terminal is, therefore, to some extent handled by the Union Pacific—an advantage enjoyed by none of the major perishable line-haul carriers at the old produce district in Missouri.

The persons who were thus induced to locate at the new terminal were carload shippers of perishable freight by railroad in interstate commerce.[1] Indeed, the Union Pacific, whose agents were in actual charge of soliciting tenants, restricted their efforts to carload shippers by railroad, deliberately rejecting as a matter of policy the small dealers who shipped by truck.[2] They appraised the worth of every prospective tenant by his carload rating—by the number of carloads of traffic he received annually, keeping lists of names of produce dealers and the number of cars they shipped.[3] The value of the concessions offered or given, generally speaking, corresponded with the relative importance of the dealers as measured by these carload ratings.[4]

Thus, by the concessions to induce them to move to the new terminal, the produce dealers became shippers over the Union Pacific, were brought into intimate relation with that line and made dependent upon it, at least for the last phase of every freight movement in and the first phase of every freight movement out.

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[1] Findings of Fact 5, 21, 22, R. 341, 354.

[2] Vice-President J. L. Haugh of the Union Pacific, who was in actual charge of leasing activities—the City's role being only formal or nominal—wrote to President Jeffers April 7, 1938: "No leases are being made to any who are not carlot shippers."—Exhibit 5, p. 13, R. 1585.

Mr. Stanley, writing Mr. Haugh July 29, 1939, regarding prospective tenants then doing business at the Missouri market, said of one firm: "This is an out and out trucker and nothing else and we would not sell him a lease if he wanted one" (Ex. 11, p. 10, R. 1753).

[3] Exhibit 4, p. 1, 4, R. 1558, 1570; Exhibit 5, p. 4, R. 1578; Exhibit 16, pp. 8-13, 15, R. 2035-0.

[4] Exhibit 27, R. 2173.

4. The Necessary Result of Excluding Other Railroads from Serving the Terminal Was to Increase Union Pacific Traffic.

The appellants allege that any advantage which the Union Pacific might otherwise enjoy from conducting the rail operations of the terminal is taken away, or at least greatly modified, by the requirement that the Union Pacific interchange traffic with other railroads and switch impartially the traffic so handled. They also allege that the Union Pacific finally offered to work out an arrangement whereby the competing western lines could be admitted to joint ownership and use of the terminal. From these alleged facts they apparently seek to draw the conclusion that the District Court was in error in its finding of a purpose to divert traffic from the other lines to the Union Pacific. The evidence, however, does not bear out these contentions. It shows a firm determination on the part of both the Union Pacific and the City that the Union Pacific alone should operate the rail facilities; and that the necessary result of this arrangement was, despite the provision for interchange with other lines, to take traffic away from them and give it to the Union Pacific.

But while the appellants constantly endeavored to keep the Union Pacific in control over the railroad facilities of the terminal itself, and to defeat any proposal looking toward the admission of other roads as joint operators, they always contemplated that the terminal would be open to the traffic of all lines entering Kansas City, even to lines like the Burlington, Missouri Pacific, Rock Island, and Santa Fe, the other major carriers of fresh fruits and vegetables from the West in competition with the Union Pacific. The other lines were expected to interchange with the Union Pacific at some point in Kansas City outside of the terminal, with the Union Pacific handling the cars from the point of interchange to

the terminal and performing all of the rail operations in the terminal area.

Both the Union Pacific and the City entertained the objective of moving the produce center of the Greater Kansas City area to the public levee and to concentrate it at the new terminal located there, and this objective could not be achieved without opening the terminal to the traffic of all of the railroads, including the competing lines from the West. The Union Pacific from the very first contemplated throwing the market open to all lines serving the City. Later on, it brought forward a specific agreement to this effect to allay the apprehensions of the Public Works Administration, lest a railroad monopoly be created by having only one railroad serving the terminal.[1] The Public Works Administration was satisfied, although it conditioned the grant upon the terminal being made available to all railroads entering the City upon fair and reasonable terms and without discrimination.[2] The requirement, however, while a safeguard against some of the grosser abuses, does not very materially cut down the advantage to the Union Pacific inherent in its position as the line operating the terminal. It requires the Union Pacific to do very little more than is compelled by law. Interchange with connecting lines is by law the manda-

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[1] Haugh to Jeffers, Ex. 6, R. 1608; Stanley to Bevington, Ex. 6, R. 1614; Haugh to Bennewitz, Ex. 7, R. 1655-6; Haugh to Jeffers, Ex. 7, R. 1660-62; Haugh to Jeffers, Ex. 7, R. 1663-4.

[2] There were two conditions on this point, as follows:

"This offer is made subject to the following special conditions:

"(a) The facilities of the Project shall be made available to all railroads entering Kansas City, Kansas, upon fair and reasonable terms and without discrimination.

"(b) All contracts for service of the Project by the railroads, including provisions for switching, joint use of trackage, and other facilities, shall be satisfactory to the Administrator."—Letter of October 24, 1938, from Public Works Administration to the City of Kansas City, Kansas, notifying it of the grant of $1,710,000, Exhibit 6, p. 40, R. 1632-33.

tory duty of every railroad.[1] The great advantage accruing to the Union Pacific by reason of its operation of the rail facilities of the terminal arises from the well-known disposition of shippers located at a place exclusively served by a particular railroad to give to it the major proportion of their traffic. This somewhat elementary principle of traffic behavior is supported by the testimony of four expert traffic witnesses, and stands uncontradicted in the record.[2] A railroad on whose line a shipper is located enjoys a substantial advantage in the solicitation of competitive traffic.[3]

The Union Pacific officials are under no illusion about the existence of a traffic advantage in their favor. They made at least three detailed estimates of the additional freight revenues which the construction of the terminal would bring to Union Pacific lines, each of the last two estimates being larger than the previous one. All three were made in 1937. The first forecast was $208,200 addi-

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[1] Interstate Commerce Act, Sec. 3(3), 49 U. S. C., 3(3). This provision reads as follows:

"All carriers, engaged in the transportation of passengers or property, subject to the provisions of this part, shall, according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares, and charges between such connecting lines, or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper."

[2] Watson, R. 693; Davis, R. 699; Meade, R. 708; Christianson, R. 704. One of the larger produce dealers testified, "The line where the shipments originate would naturally handle the shipment."—Michael, R. 735.

[3] The lower court so found. Finding of Fact 36 reads in part:

"The new Kansas City Food Terminal at Kansas City, Kansas, is located solely on the lines of defendant Union Pacific Railroad Company with the one exception relative to service to the cold storage plant heretofore noted, and said defendant has an advantage over the above-named competing lines with respect to traffic handled to or from said new terminal, for the reason that a railroad on whose line a shipper is located enjoys a substantial advantage in the solicitation of competitive traffic."

tional annual revenue;[1] the second, in June, was $240,000;[2] the third, in September, was $293,000.[3] These forecasts, made over two years in advance of the opening of the terminal, were all very conservative. Traffic officials of the Santa Fe, Missouri Pacific, and Burlington, three of appellee railroads, testified to probable losses aggregating $788,257; and a traffic official of the Rock Island, while naming no figure, testified that the loss to his company would be very substantial.[4] These figures were not seriously attacked, and the District Court held that the probable loss for the first three roads would be approximately $770,000 annually in addition to substantial loss to the Rock Island.[5]

Both the Union Pacific and the City were well acquainted with the great advantage of a food terminal to the company providing the railroad facilities. If they did not know this before, their officials got the information on a trip of inspection of terminals in other cities in April, 1937. Both Mr. Haugh and Mr. Skinner so stated.[6] Mr. Haugh made a report on the subject to Mr. Gray, then President of the Union Pacific. At Detroit, he said, the Pennsylvania, Pere Marquette, and Wabash built a food terminal, securing "a very substantial portion of the traffic that the Michigan Central formerly enjoyed into Detroit." At Cleveland, the Nickel Plate built a food terminal, taking away much traffic formerly handled by the New York Central. "There was a very substantial loss to the New York Central * * *

[1] Made by Mr. C. C. Weedin, General Freight Agent of the Union Pacific at Kansas City, Exhibit 2, pp. 31-2, R. 1508.

[2] Made by Mr. Robinson, Vice President in Charge of Traffic, Exhibit 2, p. 52, R. 1525.

[3] Made by Mr. Haugh, Vice President, Exhibit 3, p. 23, R. 1551-3.

[4] Watson, R. 1694-7, 1696; Davis, R. 699-701; Davis, R. 701; Meade, R. 708-9.

[5] Finding of Fact 36, R. 361.

[6] Skinner, R. 835-6; this trip was made between April 22 and May 3, 1939, by Messrs. McCombs, Skinner, Breidenthal, Fean, DeOreo, Haugh, Stanley, and four other Union Pacific officials; Haugh to Armstrong, April 17, 1937, Exhibit 2, p. 38, R. 1511; Haugh to Gray, May 3, 1937, Exhibit 2, p. 40, R 1512-15.

and a corresponding gain to the Nickel Plate." At Buffalo, the Erie and Nickel Plate jointly constructed a food terminal, taking business away from the New York Central. "Prior to the building of this terminal the New York Central had about 85% of the perishable business into Buffalo. Now it is said to have about 50%." His conclusion was, "All these terminals illustrate a very substantial traffic advantage to the line on whose rails they are located."[1]

The Union Pacific officials knew full well that the same thing would happen at Kansas City. As Mr. Haugh said, "We do expect it will influence business against the Missouri Pacific and possibly against the Santa Fe, and naturally we expect some concern on the part of those two railroads about the establishment of the terminal, but those two railroads are competitive railroads with the owning lines and we have no compunction to securing competitive business."[2] Indeed, the principal reason why the Union Pacific spent millions of dollars in promoting the Kansas City Food Terminal was because it confidently expected to be able thereby to divert a large volume of perishable traffic from competing railroads.

For the same reason the Union Pacific insisted on providing all of the rail service for the new terminal except the cold storage plant, and refused the request of the Missouri Pacific that the rail service be provided jointly by the two roads. The Missouri Pacific claimed the right to serve the terminal jointly under an agreement entered into in 1933 between the two lines, by which they agreed that they would jointly provide railroad service for industries on the portion of the public levee now occupied by the food terminal.[3] This arrangement was later implemented in 1937 by a tri-

[1] Vice-President Haugh to President Gray, May 3, 1937, Exhibit 2, pp. 41-2, R. 1515.

[2] Haugh to Robinson, February 23, 1938, Exhibit 14, pp. 38-9, R. 1998.

[3] Souby to Haugh, April 5, 1937, Ex. 14, pp. 9-10, R. 1970-72; Skinner, R. 863; Ex. 146, R. 2939.

partite agreement between the City, the Union Pacific, and the Missouri Pacific, in which the City granted to the two railroads rights of way for drill tracks on the public levee for a term of thirty years, and the latter agreed to construct the tracks together with such extensions as might be required for the industrial development of the property.[1] The Union Pacific officials understood, before they settled upon the scheme for expelling the Missouri Pacific that the latter road had the right under those agreements to serve the food terminal.[2]

Union Pacific counsel at first held that the rail facilities could not, under the spirit of the tripartite agreement, be built and operated exclusively by the Union Pacific without violating the tripartite agreement.[3] Subsequently a contrary legal opinion was given, based on the assumption unfounded in fact that the new terminal could be built without trespassing upon the rights of way which the City had leased jointly to the Union Pacific and the Missouri Pacific.[4] Attempts were made by the Union Pacific and the City to persuade the Missouri Pacific to agree to a modification of the tripartite agreement,[5] to avoid this open violation of the property rights of the latter road, but the Missouri Pacific turned down these overtures, insisting on its right of joint service.[6] The City and the Union Pacific, nevertheless, constructed the terminal in disregard of the rights of the Missouri Pacific under the tripartite agreement.[7]

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[1] Agreement of April 15, 1932, Ex. 185, R. 2905; Ex. 205, R. 3004-5.

[2] Haugh to Stanley, Jan. 21, 1937, Ex. 2, p. 23, R. 1502; Weedin to Mitchell, Feb. 4, 1937, Ex. 13, p. 6, R. 1790-92.

[3] Souby to Haugh, Apr. 5, 1937, Ex. 14, pp. 9-10, R. 1970-72.

[4] Souby to Haugh, Apr. 29, 1937, Ex. 14, p. 13, R. 1973-4.

[5] Haugh to Bennewitz, Ex.e4, p. 17, R. 1565-6; Skinner, R. 865-6; Stanley to Haugh, May 5, 1938, Ex. 5, pp. 19-21, R. 1590-92; Ex. 204, R. 3003.

[6] Exs. 186, 205-13, R. 2905-8, 3004-13; Skinner, R. 866; Haugh to Jeffers, Oct. 17, 1938, Ex. 6, p. 30, R. 1629.

[7] Mr. Skinner says that the terminal tracks were constructed in accordance with the so-called Supplemental Agreement (R. 867). This is the amendatory

5. *The Actual Result of Concessions Was to Increase Union Pacific Traffic.*

It has already been shown that the Union Pacific expected that its activities in the promotion of the new terminal, including those in connection with the concessions, would result in an increase in its traffic. Nor were those expectations in vain; even though this suit was brought before the new terminal had been in operation for a month, the Union Pacific had already begun to reap benefits. The negotiations for concessions, dating back at least as far as the late summer of 1937, had begun to bear fruit after the construction of the terminal got under way early in 1939 and before it was completed. Mr. Haugh reported to Mr. Jeffers July 14, 1939, "Our activities on the Kansas City Food Terminal have helped our business at Kansas City. We have endeavored in every particular to handle the matter so that it would build prestige continually and not lose any business."[1] On July 27, he wrote his President, showing that the Union Pacific had enjoyed a substantial increase in perishable traffic hauled to Kansas City in the first six months of 1939 over the first six months of 1938, while its competitors suffered a decline,[2] And why was the former division of the perishable traffic moving into Kansas City undergoing a change in favor of the Union Pacific and to the detriment of its competitors? Mr. Haugh's explanation is that the reason lay in the Union Pacific's "activities on the Kansas City Food Terminal." The help-

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agreement proposed by the Union Pacific to authorize a departure from the tripartite agreement and advocated by the City but rejected by the Missouri Pacific.

[1] Exhibit 11, p . 3, R. 1747-8.

[2] Mr. Haugh said that the Union Pacific's perishable traffic in Kansas City had increased from 989 carloads in the first six months of 1938 to 1,413 carloads in the first six months of 1939. The traffic of the competing roads declined from 5,140 in the first six months of 1938 to 4,437 carloads in the first six months of 1939. "Union Pacific unloads increased 424 cars during the period, while the unloads of all the other lines decreased 703 cars."—Exhibit 15, p. 18, R. 2019.

ful activities consisted in a very considerable part in dangling concessions before the eyes of the shippers. When, on December 23, 1939, Mr. Haugh had completed most of his "last minute negotiations with the members of the trade," he wrote to Mr. Jeffers, giving a summary of what had been accomplished in the way of securing traffic, saying that the number of firms which had been induced to move to the terminal or handle their traffic through the terminal accounted for 76 per cent of the total perishable movement at Kansas City, and indicating that negotiations were under way to bring the proportion up to 89 per cent.[1] Mr. Jeffers replied December 27, asking for "a further statement from me as to what we might expect in the way of carload traffic" after all of the negotiations had been completed.[2] The answer doubtless would have been illuminating, but exercise of the penchant of the Union Pacific officials for recording their accomplishments in their correspondence was somewhat slackened by the filing of this suit two days later.

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[1] In this report Mr. Haugh sent along two lists, one of jobbers and brokers who had either moved into their new facilities or who had arranged to move there, the other of those who had not arranged to move to the new terminal. For each dealer he showed the number of carloads handled by the Union Pacific in 1938 and the number of carloads handled by competing roads in the same year. He summarized the accomplishments as follows:

"The number of firms who have already made arrangements in the Kansas City Food Terminal handle about two-thirds of the business. In addition to that, there is about 12% of the business that is open and will probably be handled at the Kansas City Food Terminal, leaving only 24% that has not yet been arranged for. O. C. Evans Company and Michael-Swanson-Brady are friendly and are interested in moving. If the city is able to make satisfactory arrangements with them, it will add another 4,500 cars, and reduce the business not yet arranged for to 11%. With 89% of the business at the Kansas City Food Terminal, many of the other smaller firms listed, except those who have their own warehouses, will move to the new terminal." Exhibit 16, pp. 8-9; Haugh to Jeffers, R. 2035-6.

[2] Mr. Jeffers wrote, "After the leases that are now under consideration are definitely disposed of and we have a more definite picture of the whole situation, I will appreciate a further statement from you as to what we might expect in the way of carload traffic."—Exhibit 16, p. 15, R. 2039-40.

6. *The Controlling Factor in Offering or Giving Concessions was to Increase Union Pacific Traffic.*

The controlling reason why the Union Pacific made its large investment in the terminal project was to secure an increase in its rail traffic. The prospective gain it might otherwise derive from the terminal in the form of interest on the $3,000,000 expended for revenue bonds and the like was an entirely subordinate consideration. The carrying charges of its investment in the terminal, consisting of the purchase price of the revenue bonds, outlays for preliminary expenses, and the cost of the team track yard, totaling approximately $3,650,000, would at four per cent be $144,000 a year. This is comparatively small when measured against the prospective gain in traffic, which the District Court found would amount to over $770,000 a year.[1] The Union Pacific did not buy the revenue bonds as an investment. When Vice-President Haugh made a recommendation to his executive committee for the purchase of the revenue bonds, he based it on the traffic advantage which the outlay would bring to the Union Pacific.[2] The bonds were so speculative and so unattractive from an investment standpoint as to be unsalable on the market.[3] For that reason, the investment banking house of Stifel, Nicolaus & Company, which had offered to buy them if the Union Pacific would guarantee part of the carrying charges, refused to go through with the deal when the Union Pacific withdrew its previous promise to make the guarantee.

Most assuredly the Union Pacific would not have bought the speculative and unsalable revenue bonds merely as an

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[1] Finding of Fact 36, R. 361.

[2] "The money from the sale of these bonds will be used to construct a food terminal that will be served by the Union Pacific and that will add very greatly to the Union Pacific traffic."—Haugh to Charske, Chairman of the Executive Committee, October 31, 1938, Exhibit 28, p. 33, R. 2001.

[3] Finding of Fact 13, R. 346-7. Clark to Bockes, November 9, 1938, Exhibit 7, p. 36, R. 1662-3.

investment and merely in reliance on the prospect of getting back the principal with interest. It bought the bonds not as an investment in securities but as an investment in improved railroad facilities which would enhance the prospects of securing additional competitive business—the same sort of facilities as other railroads, including the Union Pacific, have openly constructed and operated to improve their business at Denver, Cleveland, Detroit, and Buffalo.[1] It is for this purpose that the Union Pacific has invested over $3,600,000 in a project of which the total cost was only $4,300,000.[2]

It is in the light of this background that it must be determined whether the concessions were offered or given with respect to transportation. It must be tolerably plain that the concessions which the Union Pacific not only offered but gave, such as the free advertising and the free trips, had something to do with transportation. Mr. Jeffers, President of the Union Pacific, in telling of the expenditure of $2,000 to give shippers a free trip to put them in a frame of mind to move to the new terminal justified the outlay because the project is "of such magnitude and is so great a traffic advantage to the Union Pacific that I believe we are warranted in advancing the money."[3] How can it for a

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[1] Finding of Fact 8, R. 342-3.

[2] The Union Pacific is spending $3,000,000 for the revenue bonds and over $600,000 for the team track yards, solely for the purpose of financing the Kansas City Food Terminal. While it is true that $1,033,000 of the purchase price of the revenue bonds went for the retirement of the bonds previously issued to construct an elevator on the public levee also served by rail exclusively by the Union Pacific, the fact remains that the outlay of $3,000,000 for the purchase of the revenue bonds was made solely for the purpose of making possible the construction of the market facilities of the terminal.

[3] "The leasing must be done in advance and it is to the Union Pacific's interest that it be complete before the Union Pacific makes any guaranty. * * * The City would advance the money if it were available, but inasmuch as the arrangement is contingent upon going forward, it cannot advance the money until the plan is declared operative. The only one who can advance

moment be doubted that when a railroad spends money in giving a free trip to shippers because of expectations of a great traffic advantage, the concession is in respect to transportation? Can it be seriously doubted that the same conclusion follows with respect to the free advertising or with respect to the Union Pacific's activities in connection with the other concessions? The Union Pacific carried on practically all of the negotiations with the shippers. It offered all of the concessions; it gave some of them and it arranged for the rest. It was the initiating force, the dominating factor, in these and all other phases of the terminal project; and whatever it did was because of "so great a traffic advantage to the Union Pacific" and therefore in respect to transportation.

7. *One Major Reason Why City Participated in Concessions was Its Desire to Secure Traffic for its Partly Owned Transportation Facility.*

As already noted, the appellants strongly urge the theory that the concessions were offered or given solely for the purpose of inducing the shippers to become tenants of the produce warehouses, forming a portion of the City's public market property. This theory rests upon a partial view of the facts and upon an unduly narrow interpretation of the significance of even that selected portion of the facts.

It is true, of course, that the City had motives of its own. Without doubt, one of its motives was its desire to accommodate the Union Pacific, its associate in the terminal enterprise and the chief financial backer. The City's investment in the terminal project was comparatively small. Aside from the value of the previously idle public levee

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the money is the Union Pacific. * * * This is a project of such magnitude and is so great a traffic advantage to the Union Pacific that I believe we are warranted in advancing the money."—Jeffers to Charske, Feb. 19, 1938, Ex. 4, R. 1568-70.

land, it amounted to only about $149,000, and that was mostly for streets, sewers, and public improvements of like character.[1] It was not obtaining any immediate profit out of the enterprise. It would not get a cent of net income or profit until the revenue bonds held by the Union Pacific were paid off with respect to both principal and interest; and, under estimates which the District Court found unduly optimistic, that could not happen for twenty-two years.[1]

It was the Union Pacific representatives who persuaded the City officials to adopt the plan of paying concessions,[2] and undoubtedly the City's desire to accommodate the company having the major financial stake in the enterprise influenced the result.

One of the other motives of the City, of course, was to fill the market buildings with tenants, but the matter did not end there. The City had not only wholesale stores which it desired to rent but also loading and unloading platforms, railroad trackage, and other terminal facilities for which it desired to secure traffic. This the City set out with clarity in its answer in the *quo warranto* proceedings, where it adverted to the terminal dock and railroad tracks as part of the facilities for which business must be secured, and to the extent of the carload traffic handled by the shippers who were to receive concessions.[3] One of the avowed

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[1] Finding of Fact 16, R. 349; Exhibit 141, R. 2907; Exhibit 227, R. 3042.

[2] Finding of Fact 34, R. 359-60.

[3] The culmination of these efforts was an address made by Vice President Haugh at a meeting of the Board of City Commissioners and an advisory committee of fifteen substantial business men of the City, Exhibit 13, pp. 219-22, R. 1946-51.

[4] "These firms will bring to the Kansas City Food Terminal the added benefit that will accrue from the attendance of their established customers upon the market, and because of the fact that they transact a total carload business averaging 7500 cars a year, will give added prestige to the market and attract other tenants to such quarters as remain unleased after they move in.

"That these 13 firms control and now have about 50% or more of the unload business at Kansas City, and in addition to the quarters above referred to, said market terminal includes 24 other units now occupied and 20 units

purposes of the City in establishing the terminal was to assist the "rail facilities particularly that handle this product,"[1] which seems to have meant helping the Union Pacific.

The City having joined with the Union Pacific in the construction of a railroad terminal was thus motivated by a desire to secure the traffic necessary for its successful operation. For the terminal, considered either as an integral whole, as the District Court found it to be, or as composed of two separate parts, one owned by the Union Pacific and the other owned by the City, is a transportation facility and is the perishable terminal of the Union Pacific at Kansas City, as will now be shown.

8. *Kansas City Food Terminal is an Integral Whole and is a Facility of Railroad Transportation.*

The Kansas City Food Terminal is a public transportation facility. It comprises wholesale produce buildings served by rail trackage, cold storage plant, farmers' market, etc., owned by Kansas City, Kansas, and perishable team track and inspection yard owned by the Union Pacific.[2] The entire rail facilities at the Food Terminal, including the City-owned tracks serving the produce buildings, are operated by the Union Pacific.[3] The perishable team track and inspection yard is regarded as part and parcel of the terminal. Mr. J. L. Haugh, Vice President

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not yet completed which are being leased for allied food lines, wholesale cheese, meats, butter, poultry, eggs, fish, etc., 75 office rooms for brokers, 72 of which are now leased, a bank building, restaurant and retail stores for feed, drugs and farmer's supplies under construction, also 428 farmers' stalls, together with a cold storage plant, grain elevator, terminal dock, railroad tracks, a public wharf on the river and filling station."—Section VIII of Answer of Defendants in *State of Kansas ex rel. Parker* v. *City of Kansas City, Kansas, et al.*, in the Supreme Court of the State of Kansas, No. 34,743, R. 66-67.

[1] Skinner to B. P. Waggener, August 6, 1938, Exhibit 204, R. 3003.

[2] Findings of Fact Nos. 8, 16, 17, R. 342, 349, 350.

[3] Findings of Fact Nos. 8 and 17, R. 342-350.

of the Union Pacific, so stated,[1] and the facilities are so depicted in map of the Fairfax Industrial District circulated by the Union Pacific Railroad[2] and in photograph of the terminal,[3] which have been reproduced and are attached as Appendices A and B to this brief.

Both the City-owned facilities, including the tracks which serve the produce buildings, and the perishable team track and inspection yard are equally necessary for the operation of the Terminal. The "declaration of policy" in favor of the new food terminal drawn by Mr. Stanley for Mr. DeOreo calls for "inspection and team track facilities for 300 or more cars"[4] as part of the terminal facilities. The shippers were much interested in the comparative merits of the rail facilities of the new terminal and those they had in Missouri.[5]

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[1] When testifying with respect to the facilities included within the designation "Kansas City Food Terminal," Mr. Haugh stated:

"Q. That is a name that this whole layout here is given, that is the official name of the whole thing?

"A. The Kansas City Food Terminal has been given to the whole thing *including the team track yard* * * *." (Italics ours.) (R. 1147.)

[2] Plaintiffs' Exhibit 251 (R. 3124) consists of an advertising folder circulated by the Union Pacific showing map of the Fairfax Industrial District and Union Pacific facilities in Greater Kansas City. Reference to the exhibit shows that the market structures and the perishable team track and inspection yard are together designated as the Kansas City Food Terminal, thus indicating that both the market structures and the perishable team track and inspection yard are advertised and held out by the Union Pacific as a single unit.

[3] Union Pacific Exhibit 232 (R. 3055) consists of a photograph of the Kansas City Food Terminal and other Public Levee improvements. Examination thereof reveals the juxtaposition of the market structures and the perishable team track and inspection yard, and the necessary relationship between such structures and the yard. The market structures and the yard are separated by Jersey Creek and appear on the left and right sides of the photograph respectively. The photograph shows that tracks serving the produce buildings lead from and connect with the perishable team track and inspection yard.

In describing the above photograph, Mr. J. L. Haugh, Vice President of the Union Pacific, included the perishable team track and inspection yard as a part of the Kansas City Food Terminal (Haugh, R. 1097-99).

[4] Exhibit 3, p. 9, R. 1541.

[5] Sheahan, R. 466; Yukon, R. 599, 609; Michael, R. 1153-4; DeFeo, R. 1537.

The Union Pacific took care to bind the City to construct the facilities south of Jersey Creek and to maintain them over a long period of years as part of the food terminal. It secured an agreement by the City to construct the warehouses, trackage, and other facilities, in accordance with designated plans, and to operate them as a food terminal for the period of the Union Pacific lease of the team track and inspection yard site, which is thirty years, with an option in favor of the Union Pacific for an extension for three subsequent periods of twenty-three years each, subject to the right of the City to discontinue use of the property as a food terminal if it elects to do so at the end of the first period or any subsequent renewal.[1]

The Union Pacific bid for the purchase of the Public Levee Revenue Bonds issued by the City of Kansas City, Kansas was conditioned upon lease of a sufficient portion of the Public Levee "to be used * * * as a site for perishable team track yard."[2] The lease entered into between Kansas City, Kansas and the Union Pacific pursuant to this condition required the Union Pacific "to commence the construction of said perishable team track yard with a capacity of approximately three hundred (300) cars," and "to maintain said team track yard * * * as long as service, in said food terminal, necessitates the maintenance thereof."[3] The City, on authority of General Statutes 13-238, agreed to construct tracks for the purpose of serving the wholesale produce buildings "to connect with trackage of the Union Pacific in the perishable team track yard to be constructed by the Union Pacific on land leased to it by the City."[4]

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[1] Exhibit 62-B, pp. 28-9, 42-5, 46, 51-3, 55-8, R. 2557-62, 2583-90, 2591-9, 2600-2605, 2606-15.

[2] Exhibit 62-B, p. 52, Section 6, R. 2603.

[3] Exhibit 62-B, p. 57, Section 7, R. 2612.

[4] Exhibit 62-B, p. 56, Section 1, R. 2608-9.

In the preambles of lease approved by the Board of Commissioners for rental of space in the warehouse buildings at the Food Terminal, it is expressly stated that Kansas City, Kansas has established a river-rail terminal on the Public Levee for accommodating shipments of products by highway, rail, and water in interstate commerce. In Section 25 thereof, Kansas City, Kansas obligates itself to construct and maintain trackage to serve the leased premises and connect same with trackage of the Union Pacific, and in Section 15 the lessee agrees to become a member of the Kansas City Food Terminal Association, which shall daily instruct the railroad or railroads serving the Kansas City Food Terminal concerning the specific car or cars which shall be spotted on trackage which is adjacent to the wholesale dealers' units and facilities.[1] These tracks were constructed by and are owned by Kansas City, Kansas.

Interstate shipments received by produce dealers who are tenants of the Kansas City Food Terminal are delivered on this trackage under the terms and conditions specified in a regularly published tariff filed with the Interstate Commerce Commission. Union Pacific Railroad Tariff No. 105-J—I. C. C. No. 4710—which was submitted by Mr. J. L. Haugh, Vice President of the Union Pacific, contains the switching charges applicable within the Kansas City Food Terminal District. In Item 1073 of the tariff, received in

[1] In the preambles it is stated:

"Whereas, the governing body of the City has established a river-rail terminal on said Public Levee and as a part of said terminal has found it necessary and convenient for the accommodation of shipping by highway, rail and water to establish certain improvements and facilities which will together constitute a wholesale food terminal to be designated as the 'Kansas City Food Terminal' and

"Whereas, the City plans to construct as a part of said Kansas City Food Terminal certain structures and facilit to be leased to wholesalers, jobbers and agents of wholesalers conducting the business or businesses of receiving, storing, shipping, handling, sale and distribution of the products of agriculture and allied food lines moving in interstate commerce or otherwise." Ex. 62-B, R. 2616-17.

evidence as Exhibit No. 236, the Kansas City Food Terminal District is described as "that portion of the Public Levee served by the Union Pacific Railroad east of Minnesota Avenue Extension, bounded on the north by Richmond Avenue Extended, on the east by the Missouri River, and on the south by the Kaw River." This description includes the City-owned tracks adjacent to the wholesale buildings as well as the tracks included in the perishable team track and inspection yard of the Union Pacific.[1]

Further evidence in confirmation of the fact that the Terminal is a transportation facility is found in the method of billing disclosed by the freight bills submitted in evidence by Arch C. Boyd, Special Examiner for the Interstate Commerce Commission. Examination of these freight bills reveals that shipments to produce dealers and brokers at the Kansas City Food Terminal are billed to "UP FX FT," meaning Union Pacific Fairfax Food Terminal; to "UP X KC FT," meaning Union Pacific Fairfax Kansas City Food Terminal; and by other billings with practically the same designation.[2]

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[1] Ex. 232, R. 3055; Ex. 251, R. 3124A.

[2] Ex. 47, R. 2349-55.

Reference by the officials of the Union Pacific to the Kansas City Food Terminal as though it were the project of that carrier, as revealed by the billing above described, is rather common. It occurs in many places in the correspondence exchanged between officials of the Union Pacific and otherwise.

In letter addressed Mr. J. L. Haugh, Vice President of the Union Pacific, on March 25, 1938, Mr. G. E. Stanley, Executive Assistant, stated:

"Everybody connected with the Union Pacific at Kansas City are heart and soul for obtaining the food terminal and they all agree that it is the biggest project that was ever attempted by the Union Pacific at Kansas City * * *" (Ex. 5, p. 12, R. 1584).

Writing to Mr. R. R. Mitchell, Freight Traffic Manager of the Union Pacific, June 12, 1938, Mr. C. C. Weedin, General Freight & Passenger Agent of the Union Pacific, said, "Friendly interest toward *our project* continues to grow among the dealers" (Ex. 15, p. 10, R. 2013).

Telegraphing President Jeffers and other officers of the Union Pacific, December 12, 1939, after the terminal had opened, Mr. Weedin said, "7 new out of town trucks observed in new market who heretofore had not been in *our market*" (Ex. 18, p. 6, R. 2077).

The term "railroad" as used in the Interstate Commerce Act is defined in section 1 (3) thereof to include, among other things, "all * * * terminals, and terminal facilities of every kind used or necessary in the transportation of * * * persons or property * * *, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property." The facts above recited conclusively demonstrate that the Kansas City Food Terminal, which has been provided by Kansas City, Kansas and the Union Pacific, comes within this description. The terminal, including both the Union Pacific perishable team track and inspection yard which is an indispensable adjunct thereof and the City-owned terminal tracks, constitutes "terminal facilities * * * used * * * in the transportation service" and, therefore, a transportation facility.

The fact that the Kansas City Food Terminal constitutes a facility of transportation is established by the decision of the Supreme Court in *Southern Pacific Terminal Co. v. Interstate Commerce Commission.*[1] In that case, suit was brought to enjoin an order of the Interstate Commerce Commission requiring the Southern Pacific Terminal Company to desist from granting undue privileges and advantages to one Young, a shipper of cottonseed products at the port of Galveston, Texas, through failure to exact from him payment of wharfage charges for handling cottonseed cake and meal over the piers of the Terminal Company, while at the same time exacting such charges from other shippers of like products; and from giving and allowing Young for his exclusive use space on the wharves of the Terminal Company at Galveston for the storage of said cottonseed cake and meal, while at the same time refusing similar privileges to other shippers under similar circumstances.

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[1] (1911) 219 U. S. 498.

The Southern Pacific Terminal Company, a Texas corporation, was organized to construct and maintain wharves and docks at Galveston for the accommodation of all kinds of vessels, and to construct and maintain upon the property, terminal facilities for the use of the Southern Pacific Railroad and Steamship Systems. Ninety-nine per cent of the capital stock of the Terminal Company was owned by the Southern Pacific. Import and export traffic passing through Galveston moved over the wharves and docks of the Terminal Company and the only track facilities for such traffic were those owned by the Terminal Company on its own land. The Terminal Company owned no stock in any of the railroads using the Terminal. It conducted a wharfage business and published a schedule of charges which was not, however, filed with the Interstate Commerce Commission.

The Terminal Company owned two piers, and had erected on them facilities for handling import and export traffic. In pursuance of negotiations with Young, the Company constructed another pier, and erected thereon a warehouse, shed, and platform for his use at a cost of $65,000, and leased the same to him at a yearly rental of $15,000 upon his agreement to route all shipments of cottonseed and cottonseed products purchased or shipped by him over the lines of the Terminal Company and its connections. All cottonseed meal cake passing over the old piers paid a wharfage of twenty cents per short ton. Young paid no wharfage or storage charge other than as might be included in the rental of $15,000 per year. As a result of this advantage, he netted thirty cents or forty cents per ton more than importers and exporters handling similar products, and obtained a material advantage over them.

The Terminal Company contended that it was not engaged in the transportation business, but had simply leased its own property to Young, and that its dealings with him did not come within the jurisdiction of the Interstate Com-

merce Commission. This Court held that the facilities of the Terminal Company constituted a part of transportation in interstate commerce and came under the jurisdiction of the Interstate Commerce Commission, and since the concession to Young violated the act, that the order of the Commission should be affirmed. It further held that the Terminal Company and the Southern Pacific Railroad Company constituted a part of the same system of transportation because the Terminal Company provided terminal facilities for all inbound and outbound freight at the port of Galveston. In discussing these phases of the matter, the Court stated:

"* * * The control and operation of the Southern Pacific Company of the railroads and the terminal company have united them into a system of which all are necessary parts, the terminal company as well as the railroad companies. As said by the Interstate Commerce Commission, 'the terminal company was organized to furnish terminal facilities for the system at the port of Galveston'; and it is further said that '*through shipments on the railroad lines from and to points in different states of the Union pass and repass over the docks of the terminal company. It forms a link in this chain of transportation. It is necessary to complete the avenue through which move shipments over these lines owned by a single corporation.*' And this unity of the railroad's lines and the terminal facilities is recognized in the lease to Young. By it he agrees to route all of his shipments over 'the lines of the terminal company and its connections, according to the instructions of said terminal company from time to time.' * * *

"The reasoning of the Commission is justified by the statute. It includes in the term 'railroad' all bridges and ferries used or operated in connection with any railroad, and also all the roads in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also

include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property.

"The property of the terminal company is 'necessary in the transportation or delivery' of the interstate and foreign freight transported by the lines of the Southern Pacific System. It is the only terminal for freight moving over the lines of such system, the rails of one of those lines, the Galveston, Harrisburg & San Antonio Railway Company, connecting with tracks upon the docks of the terminal company. * * *

"In opposition to these views appellants urge the legal individuality of the different railroads and the terminal company, and cite cases which establish, it is contended, that stock ownership simply or through a holding company does not identify them. We are not concerned to combat the proposition. *The record does not present a case of stock ownership merely, or of a holding company which was content to hold. It presents a case, as we have alread said, of one actively managing and uniting the railroads and the terminal company into an organized system. And it is with the system that the law must deal, not with its elements.* * * *"[1] (Italics ours.)

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[1] In a number of cases subsequently decided, the Supreme Court has held that terminal facilities which constitute a necessary part of the through transportation provided by line-haul carriers must be regarded as an integral part of the public facilities of such carriers and subject to the jurisdiction of the Interstate Commerce Commission; e.g., the stock yards considered in *United States* v. *Union Stock Yard* (1912), 226 U. S. 286, 304-305; the dock and warehouses considered in *United States* v. *Baltimore & Ohio R. R. Co.* (1913), 231 U. S. 274, 288; the union freight station considered in *United States* v. *Brooklyn Terminal* (1919), 249 U. S. 297, 304; and the receiving and delivery tracks at the Ft. Benning Military Reservation considered in *Powell* v. *United States* (1937), 300 U. S. 276, 286.

See, also, *In Re Wharfage Facilities at Pensacola, Fla.* (1913), 27 I. C. C. 252, 256-257, and *Storage in Transit at New Haven, Conn.* (1932), 190 I. C. C. 209, 211.

The reasoning of the court in the *Southern Pacific Terminal* case clearly establishes that the Kansas City Food Terminal is a transportation facility. Kansas City, Kansas, is not a common carrier and does not operate locomotives or cars. However, like the Southern Pacific Terminal Company, it constructed and owns the facilities which constitute a link in interstate transportation. The wholesale units of the Food Terminal constitute the first link in the outbound shipment of products from the Kansas City Food Terminal and the last link in the inbound shipment of such products to said Terminal. This Court stated that the only facilities for the movement of import and export traffic through the port of Galveston were the facilities provided by the Southern Pacific Terminal Company. Likewise, in the instant case, the only facilities for the movement of shipments in interstate transportation between the lines of the Union Pacific and the wholesale units of the Kansas City Food Terminal are the terminal tracks owned by Kansas City, Kansas. The Food Terminal is one complete comprehensive affair in which the Union Pacific and Kansas City, Kansas, combine to provide facilities for interstate transportation. It is a transportation facility—the perishable food terminal of the Union Pacific at Kansas City.

In considering the status of the Kansas City Food Terminal, it must be borne in mind that the Food Terminal was partly designed and intended to provide not only rail facilities but also warehouse facilities for the wholesale distribution of food products transported in interstate commerce.[1] But a wholesale center is not, as appellants con-

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[1] It is so described in the Founders' Lease approved for renting space in the produce buildings (Ex. 62-B, Sec. 1, R. 2616-17), in the *quo warranto* proceeding testing the authority of Kansas City, Kansas, to make cash payments to produce dealers (151 Kans. 2; 98 Pac. (2d) 101). Moreover the record shows that lease of space was confined to carlot shippers (R. 1585).

tend, a public market, which, by judicial definition and ordinary acceptation, is regarded as a place where buyers and sellers congregate and exchange goods at retail;[1] and much more nearly resembles a fruit auction conducted in a railroad warehouse or station where goods are sold in bulk to wholesalers and jobbers. Food terminals such as the Kansas City Food Terminal are in reality a proper and necessary, if not indispensable, adjunct of the railroads which cooperate in their establishment. They are peculiarly an outgrowth of railroad enterprise and effort.[2] Manifestly, such terminals and the railroads which serve them constitute an integral whole, and the terminals themselves, are a public transportation facility.

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[1] In *Taggert* v. *City of Detroit* (1888), 38 N. W. 714, the Supreme Court of Michigan held that the Central Public Market in the City of Detroit was a public franchise and that the city could be restrained from taking measures to abolish it. In the course of its opinion, it defined a public market as follows:

"Markets are as old as civilization, and public market places have in many countries been identified with the most important events in their history. The purpose of markets has always been to secure to all persons the privileges and conveniences arising from a general concourse of buyers and sellers. *One main object is to enable producers to meet consumers of the usual necessaries of life directly, and without the interference of middlemen.* The charter of Detroit has always contained authority to prevent forestalling and regrading, and the city has always had ordinances on that subject, which have no place in the absence of market facilities. Freedom of access to farmers and gardeners and all other persons having provisions and the like to sell, so that purchasers may get supplies directly from them, as well as find all the different varieties of supplies in the same place, is regarded as an important legal right which should not be interfered with." (Italics ours.)

See, also, *Hughes* v. *Recorder's Court of Detroit* (1889), 42 N. W. 984, wherein the Supreme Court of Michigan reiterated the doctrine expressed in the foregoing decision to the effect that direct communication between purchasers and producers is essential to the character of a general market.

[2] Similar terminals are owned and operated by railroads at Denver, Detroit, Cleveland, and Buffalo. (Finding of Fact No. 8, R. 370.)

9. *City-owned Trackage Separately Considered Is Facility of Railroad Transportation.*

The tracks adjacent to the produce buildings are owned by Kansas City, Kansas and operated by the Union Pacific.[1] Products originated by or destined to produce dealers conducting business in the various units of the produce buildings are transported from or to the perishable team track and inspection yard of the Union Pacific or from or to the produce buildings via these tracks.[2] Analysis of the history and conditions of use of these City-owned tracks demonstrates how completely Kansas City, Kansas has provided a facility of transportation in the establishment of the Kansas City Food Terminal.

Mr. William C. Crow, Assistant Agricultural Economist, Bureau of Agricultural Economics, United States Department of Agriculture, who made an investigation of the proposed Kansas City Food Terminal in connection with the application of Kansas City, Kansas for a grant of federal funds to assist in its construction,[3] insisted that the produce buildings at the proposed Food Terminal be directly served by railroad trackage adjacent to loading platforms, which would permit transfer of the products from the floor of the freight car to the floor of the produce buildings without the necessity for truck haul from the perishable team track and inspection yard.[4] Mr. J. L. Haugh, Vice President of the Union Pacific, who played a dominant role in all phases of the establishment and construction of the Food Terminal, first vigorously objected to the construction of such track-

[1] Findings of Fact Nos. 8, 16, 17, R. 370, 373.

[2] Reference to the photograph received in evidence as Union Pacific Exhibit No. 232 and attached hereto as Appendix A shows that these tracks lie immediately in the rear and adjacent to the loading platforms of Produce Buildings A, B, C, and D, and are connected by two lead tracks with the perishable team track and inspection yard.

[3] Ex. 3, pp. 5 and 8, R. 1537-41; Ex. 14, pp. 17-32, R. 1976-92.

[4] Crow, R. 991-2, 997-8.

age, but finally yielded to the importunities of Mr. Crow and provided for such trackage in the plans for the Terminal.[1] The trackage, accordingly, was constructed by and at the expense of the City, and is operated by the Union Pacific. The tracks aggregate 0.877 miles in length. The original cost was $29,460 and the reproduction cost is $19,279.[2]

The City-owned tracks are not leased to tenants of the produce buildings. The City merely obligates itself in the form of lease approved by the Board of Commissioners to "construct and maintain an industry track * * * to serve the leased premises and premises leased to other lessees in said food terminal, which track shall be connected with trackage of Union Pacific Railroad Company and will be operated by that Railroad Company."[3] In Section 1 of said lease it is also provided that the warehouse units leased by produce dealers shall be adjacent to a sales and loading platform "which * * * may be preferentially used by this lessee and also in common by the lessees of various units

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[1] Mr. Haugh stated:

"I had a long argument or rather Mr. Crow in the Department of Agriculture had a long argument with me about the tracks adjoining the houses. You see each one of these houses has 20 units in it and probably an average of 12 to 15 different produce merchants in each one. Now, there are two tracks of each house, the one track immediately adjacent to the platform, of course, unloading directly over the platform and the next one unloading fruit. Well, Crow and Mr. Waugh, his superior officer, just insisted on the tracks being placed at the platform. Singularly at that time there was no other market in the United States with tracks like that. I tell you that to indicate the development of the market. *It is the most important thing about the market.* Well, the conclusion of this argument was that we compromised and I accepted Crow's views on it. But in order to do that, we had to build this sorting yard there to the north of the team track yards so that we could shut in those cars, so that we could sort them by dealers, so that we could stop them at the house in their proper order." R. 1099.

See, also, Crow's testimony, R. 997-8.

[2] Plaintiffs' Ex. 275, R. 3357-60, and Plaintiffs' Ex. 277, R. 3367.

[3] Ex. 62-B, Sec. 25, TR. 3381.

in the food terminal and the customers of each * * *."[1] Neither the City-owned tracks nor the loading platforms in the rear of the produce buildings are, therefore, under lease to or exclusively used by tenants of the produce buildings. They are utilized by the individual tenant in common with all other occupants of the produce building in which he conducts his business.

The City-owned tracks adjacent to the produce buildings are regarded as part and parcel of the system of transportation operated by the Union Pacific. Shipments of food products moving in interstate transportation over the lines of the Union Pacific and other road-haul carriers are received and delivered on these tracks. In Union Pacific tariff No. 105-J—I. C. C. No. 4710—, it is specifically provided that inbound and outbound shipments of food products which have moved over the lines of the Union Pacific will be switched to and from the Kansas City Food Terminal District (including both the perishable team track and inspection yard and the City-owned tracks) without the imposition of any charge in addition to the rates published for the road-haul movement over the Union Pacific;[2] and provision for the absorption of such switching charges without expense to shippers when shipments have been transported in road-haul movement over their lines has been made by the other carriers serving the Kansas City, Missouri-Kansas Switching District.[3]

[1] Ex. 62-B, Sec. 1, TR. 3378.

[2] See Items 1073 and 1074 of Ex. 236, TR. 4044-A-4045.

[3] Wabash Ry. Co., I. C. C. No. 7160, Ex. 237, R. 4134-4137; St. Louis-San Francisco Ry. Co., I. C. C. No. 10862, Ex. 238, R. 4138-4167; Alton R. R. Co., I. C. C. No. 177, Ex. 239, R. 4168-4172; Chicago, Milwaukee, St. Paul & Pacific R. R. Co., I. C. C. No. B-7000, Ex. 240, R. 4173-4177; The Atchison, Topeka and Santa Fe Ry. Co., I. C. C. No. 13033, Ex. 241, R. 4178-4186; Chicago Great Western R. R. Co., I. C. C. No. 5494, Ex. 242, R. 4187-4191; Chicago, Burlington & Quincy R. R. Co., I. C. C. No. 15625, Ex. 243, R. 4193; Missouri Pacific R. R. Co., I. C. C. No. A-8917, Ex. 244, R. 4194-4200; Missouri-Kansas-Texas R. R. Co., I. C. C. No. 1169, Ex. 245, R. 4201-4204; Chicago, Rock Island & Pacific Ry. Co., I. C. C. No. C-12853, Ex. 246, R. 4205-4212; Kansas City Southern Ry. Co., I. C. C. No. 4706, Ex. 247, R. 4213-4219.

When tracks such as the City-owned tracks at the Kansas City Food Terminal are utilized by an interstate rail carrier as a terminus for the receipt and delivery of outbound and inbound freight traffic moving over its system, they constitute a part of the transportation facilities of the carrier which are operated under the obligations of public service and are subject to the regulation of public authority. And this is true despite the fact that the tracks may have been constructed to serve a particular industry which was in special need thereof and defrayed part of the cost of construction. In *Union Lime Co.* v. *Chicago & Northwestern Ry. Co.*,[1] this Court upheld the constitutionality under the Fourteenth Amendment of a statute of Wisconsin permitting condemnation of right of way for spur tracks. In disposing of the matter, the Court referred with approval to the following quoted portion of an opinion of the Supreme Court of Wisconsin upholding an order of the Railroad Commission of Wisconsin requiring the Chicago & Northwestern to construct the spur track under consideration:

> "* * * 'Such track when built becomes a portion of the trackage of the railroad. The fact that its initial cost is borne by the party primarily to be served, with provisions for subsequent equitable division of such cost, does not make it a private track nor change the nature of its use. Over it the products of the industry find their way into the markets of the world, and every consumer is directly interested in the lessened cost of such products resulting from the building and operation thereof. That these products are supplied by a single owner, or by a limited number of owners, affects the extent and not the nature of its use—the track is none the less a part of the avenue through which the commodities reach the public. Subject to the equitable division of initial cost, the track is at the service of the

[1] (1914) 233 U. S. 211.

public as much as any other, and it constitutes an integral part of the railroad system. The duty to maintain and operate it rests upon the railroad. Except that it is relieved of the initial cost of right of way and construction, the track stands in the same relation to it that any other portion of its track does. The owner of the industry obtains no interest in or control over it beyond that of being served by it equally with any one else who may desire to use it.' * * *'' (pp. 220-221.)

And stated:

"It is urged, further that the statute is necessarily invalid because it establishes as the criterion of the Commission's action the exigency of a private business. This objection, however, fails to take account of the distinction between the requirements of industry and trade which may warrant the building of a branch track and the nature of the use to which it is devoted when built. A spur may, at the outset, lead only to a single industry or establishment; it may be constructed to furnish an outlet for the products of a particular plant; its cost may be defrayed by those in special need of its service at the time. But none the less, by virtue of the conditions under which it is provided, the spur may constitute at all times a part of the transportation facilities of the carrier which are operated under the obligations of public service and are subject to the regulation of public authority. As was said by this court in *Hairston* v. *Danville & Western Rwy. Co., supra* (p. 608): 'The uses for which the track was desired are not the less public because the motive which dictated its location over this particular land was to reach a private industry, or because the proprietors of that industry contributed in any way to the cost.' There is a clear distinction between spurs which are owned and operated by a common carrier as a part of its system and under its public obligation and merely private sidings. See *De Camp* v. *Hibernia R. R. Co.*, 47 N. J. Law, 43; *Chicago etc. R. R. Co.* v. *Porter*, 43 Minnesota,

527; *Ulmer* v. *Lime Rock R. R. Co.*, 98 Maine, 579; *Railway Company* v. *Petty*, 57 Arkansas, 359; *Dietrich* v. *Murdock*, 42 Missouri, 279; *Bedford Quarries Co.* v. *Chicago etc. R. R. Co.*, 175 Indiana, 303.

"While common carriers may not be compelled to make unreasonable outlays (*Missouri Pacific Rwy. Co.* v. *Nebraska*, 217 U. S. 196), it is competent for the State, acting within the sphere of its jurisdiction, to provide for an extension of their transportation facilities, under reasonable conditions, so as to meet the demands of trade; and it may impress upon these extensions of the carriers' lines, thus furnished under the direction of authority of the State, a public character regardless of the number served at the beginning. * * *"[1] (pp. 221-222.)

These tracks were constructed by the City upon the Public Levee for the accommodation of tenants of the Terminal without cost to the Union Pacific. However, such tracks,

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[1] In *Alton Railroad Co.* v. *Illinois Commission* (1939), 305 U. S. 548, this Court, after referring to its decision in *Union Lime Co.* v. *Chicago & Northwestern Ry. Co.*, *supra*, and several others, held that the Alton Railroad Company could be compelled by order of the Illinois Commerce Commission to operate and maintain a switch track from its main line to industrial plants *originally constructed without cost to it* on the lands of others because such track had been devoted to public use and constituted an extension of the railroad's transportation system. The court stated:

"Asserting that the duty to maintain a track such as that in question normally results from ownership, appellant earnestly insists that the order is shown to be unreasonable by the fact that rails and other materials purchased and owned by it when put into the track immediately cease to belong to it and become the property of the gas company which, appellant says, retains right of ownership in the track. But, in making that and similar arguments, appellant ignores the decisions in this case of the commission, the state supreme court, and as well the ruling of this Court just indicated, to the effect that the track in question is one built for industrial purposes on and across public thoroughfares; a track that has become a part of the main line of the carrier's system and, though constructed without cost to it on lands owned by others, is open to public use; a track which has long been and is being used by the carrier for its own benefit and by it may be used with extensions if any shall be made, to serve the public at large" (pp. 554-555).

See, also, *Tap Line* cases, 234 U. S. 1.

because of the conditions of their use, have become an integral part of the transportation system of the Union Pacific and are, therefore, subject to the jurisdiction of the Interstate Commerce Commission under the holding of the Supreme Court in *Union Lime Co.* v. *Chicago & Northwestern Railway Company, supra.*

Of still greater significance in determining the true character of the City-owned tracks is the fact that shipments may be received by tenants of the Kansas City Food Terminal either in the perishable team track and inspection yard or on the City-owned tracks without extra charge in addition to the rates prescribed for the line-haul movement. Delivery on the City-owned tracks is, therefore, regarded as a substitute for team track delivery in the yard of the Union Pacific, and the service thus afforded manifestly is the equivalent of team track delivery. Under the circumstances, the City-owned tracks must be regarded as devoted to transportation service of the Union Pacific in the same manner and to the same extent as the perishable team track and inspection yard of that carrier.

In *Associated Jobbers of Los Angeles* v. *A. T. & S. F. Ry. Co., et al.,*[1] the Interstate Commerce Commission had under consideration the question whether certain railroads serving the City of Los Angeles could properly impose an additional charge for delivering or receiving carload freight to and from industries located upon spurs or side tracks *within their switching limits* when such carload freight moved incidentally to a line-haul and the railroad receiving or delivering such freight receives the whole or part of the compensation for the line-haul. The Commission, after extensive consideration of the matter, held that the tracks in question constituted terminal facilities of the railroads in the same manner as team tracks, railroad depots, etc., and that no

[1] (1910) 18 I. C. C. 310.

warrant, therefore, existed for the imposition of any charges in addition to the line-haul rates for the delivery of carload freight thereon. Accordingly, the Commission entered an order condemning as illegal and unjust the charges of the railroads. In the course of its opinion, the Commission stated:

> "* * * in connecting its main line directly with a spur, the carrier serves itself in various ways; it gains an extension of its own line for various terminal uses, makes a new highway for inter-communication between the carrier and the industry and likewise between each industry so connected and all others having a similar connection, and it attaches the industry to the carrier in such a way that the latter has a practical assurance of the industry's traffic both outbound and inbound. On the other hand, there can be no doubt but that the industry also benefits by such connection, in that it can receive by this spur track direct delivery of its freight without the expense and trouble of draying to and from public team tracks. *Each of such spurs is in a real sense a railroad terminal at which the carrier receives and delivers freight* * * *.
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> "We are fully convinced that the complainant's view of the nature of these tracks is correct and that they are portions of the terminal facilities of the carrier with whose lines they connect, and, together with the team tracks and other yards, form the terminal facilities of these carriers. In saying this we are fully conscious of the authority of the *Alton* case (*Chicago & Alton* v. *United States*, 156 Fed. Rep. 558) and the *General Electric* and *Solvay Process cases*, 14 I. C. C. Rep., 237, 246. Such industrial spurs as are here considered, however, are of a totally different character and of a different nature from those considered in these three named cases. They correspond rather to the railroad tracks leading to the interchange tracks with such industries, and the switching movement given by the carriers without extra charge to such interchange tracks passed unquestioned in the above cases. * * *
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"* * * The railroads recognize their duty to make delivery under the flat rate stated in their tariffs, and such delivery is made upon industry tracks, which are part of the carrier's terminals, without additional charge. They treat a dependent spur as a part of their own depot to which the published rate carries all freight. They have recognized the value of having industries located on their tracks and have competed, in proper and in improper ways, to secure them as dependencies. *They have, accordingly, given to such industries the same service that they give at their team tracks, treating the one as the substitute or equivalent of the other.* If delivery is made at the team track the carrier must haul the car from the main line and place it on the team track. And so, if delivery is to be made at an industry, it must be conveyed from the main line to the industry. In the former as in the latter case there is an inter-terminal switching and a placement of the car." (Italics ours.)

Upon review, this Court after discussing the facts and order of the Commission at considerable length, stated:[1]

"* * * it cannot be maintained that the delivery and receipt of goods on industrial spur tracks within the switching limits in a city is necessarily an added service for which the carrier is entitled to make, or should make, a charge additional to the line-haul rate to or from that city, *when the line-haul rate embraces a receiving and delivering service for which the spur-track service is a substitute.* It is said that carriers are bound to carry only to or from their terminal stations. But when industrial spur tracks have been established within the carrier's switching limits, within which also various team tracks are located, these spurs may in fact constitute an essential part of the carrier's terminal system."[2] (Italics ours.) (pp. 310-311.)

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[1] Los Angeles Switching Case (1914), 234 U. S. 294.

[2] The fact that a carrier may establish a certain place as a terminus for shipments transported over its line and include service thereto in its rates for line-haul transportation has long been recognized. In *Union Trust Co.* v. *A. T. & S. F. Ry. Co.* (1894), 64 Fed. 992, 995-996, the Circuit Court, Northern Dis-

Performance of transportation service over the City-owned tracks by the Union Pacific without extra charge in addition to the rates published and collected for line-haul transportation rather conclusively establishes the fact that the City-owned tracks are public in their nature and constitute a part of the transportation system of the Union Pacific rather than private industrial sidings. Interstate carriers are not required to perform transportation service over privately owned track facilities without compensation. If they do so, they violate the provisions of the Interstate Commerce Act and the Elkins Act prohibiting rebating. The Interstate Commerce Commission considered this matter in *Propriety of Operating Practices—Terminal Services*[1] and stated:

> "If a carrier operates over private industrial tracks, it is because in its discretion it elects to do so, and its legal obligations in such operations extend no farther than is covered by the compensation it exacts for the services performed. In other words, the obligation upon the carrier in such circumstances is to be measured by the compensation received and not by any definite duty otherwise placed upon the carrier by the statutes. The payment by the carrier to a shipper for

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trict of Illinois, held that, "The universality of delivery at a certain place, or something approaching that, may be the very thing that constitutes that place the company's depot," and "If the practice of the carrier is of such a character that the public is reasonably led to understand that a certain place to be the company's depot, the carrier should be held to that understanding. Terminal charges are allowed in particular cases where the delivery is to be somewhere else than at the carrier's depot, but that does not allow the carrier to establish its depot at some place off the line, and then add terminal charges."

The fact that tenants of the produce buildings have leased space adjacent to the city-owned tracks at the Kansas City Food Terminal does not alter the obligation of the Union Pacific to afford service over such tracks without extra charge in addition to the rates published for line-haul transportation. *In Restriction of Public Team Track Service* (1929), 159 I. C. C. 135, 137, the Interstate Commerce Commission held that lease of land adjoining public delivery tracks by certain industries does not convert the public tracks into private tracks so far as the particular industries are concerned.

[1] (1935) 209 I. C. C. 11, 29.

rendering services upon private tracks which are not contemplated by the charges of the carrier would be 'a gift—a rebate—a thing *ipso facto* illegal and prohibited by the statute.' *Mitchell Coal & Coke Co.* v. *Pennsylvania R. Co., supra. Further, the rendition by the carrier of such services as are not contemplated by the compensation which it receives free and without additional charge is prohibited by section 6 of the act. American Exp. Co.* v. *United States, supra.*" [1] (Italics ours.)

Were the City-owned tracks not classified as public tracks over which the Union Pacific is obligated to provide transportation service without extra charge in addition to the line-haul rates, the Union Pacific would be guilty of rebating to the tenants of the produce buildings.

The transportation service performed by the Union Pacific over the City-owned tracks has impressed them with a public character as extensions of the Union Pacific's system of transportation. They are utilized by the Union Pacific and the tenants of the produce buildings as terminal facilities for the receipt and delivery of interstate freight moving over the lines of the Union Pacific and other carriers, and handling thereover is regarded as a substitute for delivery within the perishable team track and inspection yard. No charge in addition to the rates published for line-haul transportation is imposed for service over these tracks. Under the circumstances, the City-owned tracks are devoted to public transportation service, and service thereover is subject to regulation by the Interstate Commerce Com-

[1] See *United States* v. *American Tin Plate Co.* (1937), 301 U. S. 402; *United States* v. *Pan American Petroleum Corporation* (1938), 304 U. S. 156; and *Inland Steel Co.* v. *United States* (1939), 306 U. S. 153, upholding the validity of orders issued by the Commission with supplementary reports in the above entitled proceeding.

See also *Terminal Allowance at Saltville, Virginia* (1940), 241 I. C. C. 355.

mission. By constructing such tracks and turning them over to the Union Pacific for operation, Kansas City, Kansas has provided a facility of transportation.

V.

Both Union Pacific and City Responsible on Grounds of Device, Conspiracy, Aiding and Abetting, and Joint Venture.

1. *Both Union Pacific and City Were Parties to Device to Grant Concessions to Shippers.*

The principal ground upon which the lower court found the appellants in violation of the law is that they employed a device to give rebates and concessions when such a device is among the things specifically prohibited by both the Interstate Commerce Act and the Elkins Act. This holding was made chiefly with respect to the two largest and most important types of concessions: cash bonuses and rental credits, which were ostensibly to be given by the City. The appellants are claiming in this Court that the City was lawfully entitled to give the concessions, and the Union Pacific merely assisted the City to do what it lawfully might.

This asserted error in the holding of the lower court is for several reasons wholly without substance. Neither the City nor the Union Pacific could lawfully offer or give concessions with respect to transportation as these were given. As the lower court found, the City was only ostensibly the sole source of the offers, gifts, and grants.[1]

Actually the two parties, under the leadership and dominance of the Union Pacific, deliberately undertook to concoct and execute a device whereby the concessions could be made under color of legality. The manifest purpose, in

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[1] Finding of Fact 20, R. 352-53.

the mind of the Union Pacific at least, was to evade the provisions of the Federal statutes against rebating which it knew full well stood in the way of its making any concessions.[1]

Through Mr. Stanley, its executive assistant, and Mr. DeOreo and Mr. Fean, its salaried agents, the Union Pacific carried on the negotiations with the produce dealers and made promises of cash bonuses, free rentals, and other valuable considerations, to induce them to move to the food terminal and become shippers over its line.[2] Long after the railroad had made these commitments, it persuaded the City to lend the use of its official machinery for carrying them out.[3] It worked out the scheme of obtaining advance payments of rental from The City Ice & Fuel Company to secure part of the funds for the cash bonuses and secured the City's approval of the plan.[4] It waived its lien on the terminal funds with which the cash bonuses were to be paid.[5] The rental concessions were to be made by giving

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[1] Opinion below, p. 7. R. 249; Cherrito, R. 454, 456; Zeigler, R. 458-9; Sheahan, R. 466-70; Litman, R. 550-51; Yukon, R. 600-601; Winnick, R. 610-11; Sarser, R. 732-3; Michael, R. 735-6; Stanley, R. 1075-77.

Mr. Stanley "as a lawyer, knew that it is unlawful to give shippers money or buy traffic" (R. 1082). For this reason, Mr. Stanley was punctilious in informing the produce dealers on every occasion that the Union Pacific could itself make no payments (R. 1053). Mr. Haugh had specific written advice from Union Pacific counsel about illegality of pecuniary inducements to shippers to secure traffic (Spencer to Haugh, et al., June 28, 1939, Ex. 10, R. 1742-3).

[2] Findings of Fact 18-20, R. 350-54; Burns, R. 448-53; Zeigler, R. 459; Sheahan, R. 465-9; Rosensweig, R. 647; Marshall, R. 710-16; Ex. 105, R. 2851; Stanley, R. 1069-77; Baum, R. 1256-9; Ex. 4, p. 25, R. 1572-3; Ex. 62-B, pp. 18, 25, R. 2543-50, 2555-6; Ex. 9, pp. 19-20, 24, 26, 29, 30, 31, R. 1699-1701, 1703-4, 1704-6, 1706-9, 1708, 1708-9; Ex. 21, p. 10, R. 2103; Ex. 22, R. 2115-27; Ex. 42, R. 2312-15; Ex. 43, R. 2321-24; Boyd, R. 447; Fean, R. 583-85; DeOreo, R. 628-30; Stanley, R. 1047; Stanley, R. 1072-3; Haugh, R. 1105.

[3] Finding of Fact 19, R. 351-2; Ex. 105, R. 2853; Payne, R. 679.

[4] Finding of Fact 19, R. 351-2; Ex. 12, pp. 19, 24, R. 1777, 1780-81; Ex. 13, pp. 219-20, R. 1946-51; Skinner, R. 857-8; Haugh, R. 1118-19; Stanley, R. 1130.

[5] Findings of Fact 24 and 25, R. 355-6; Conclusions of Law 12 and 13, R. 371-72.

shippers the use, free or at inadequate rentals, of warehouse properties which had been constructed largely through the use of Union Pacific funds and in which the Union Pacific had a beneficial interest.[1]

The contention that the City was the principal and the Union Pacific an agent or a company merely rendering incidental assistance in these negotiations is wholly unwarranted by the evidence. The negotiations for concessions were an outgrowth of the campaign for the solicitation of tenants for the terminal, which, from the very first, was conducted by Union Pacific officials like Haugh and Stanley as well as by DeOreo and Fean. The Union Pacific always supervised the work of DeOreo and Fean, even when they were nominally rental agents for the City for a few months from June to October, 1938; and it carried them on the payroll of a subsidiary from November, 1938, until after this suit was brought in late December, 1939. To further the success of the solicitation, Stanley, DeOreo and Fean offered various forms of concessions to the shippers from the summer of 1937 until the very day this suit was brought at the end of 1939.[2]

The City's first action on the subject was the appointment of an investigating committee, November 16, 1939,[3] and when the committee held its meeting some days later—with a Union Pacific attorney present taking notes—[4] the produce dealers interviewed told of talks about concessions with Stanley and DeOreo, and of DeOreo's promises that they would be paid.[5]

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[1] Findings of Fact 12 and 13, R. 344-7. Finding of Fact 16, R. 349; Finding of Fact 26, R. 356-7; Finding of Fact 34, R. 359-60.

[2] Finding of Fact 19, R. 351-52; Ex. 14, pp. 30-32, R. 1989-91; Ex. 86, R. 2757; Ex. 89-90, R. 2759-60, Yukon, R. 594-95, R. 619-20; DeOreo, R. 621-22; R. 1172-1175.

[3] R. Payne, R. 675, Skinner, 801-02, McCombs, R. 902; Ex. 105, R. 2851.

[4] R. Payne, R. 675-76, 680-684. Skinner, R. 802; Ex. 12, R. 1765.

[5] Payne, R. 676-7, 679; Ex. 105, R. 2853.

What the City did was largely confined to ratifying the promises and arrangements after they had already been made by the Union Pacific. In this and every other phase of the project the Union Pacific planned the strategy, took the initiative, conducted the detail of affairs, and exercised the substance of control. The City regularly affixed the stamp of official approval—a rubber stamp—passing resolutions and ordinances as required, functioning throughout as a faithful front.

Those who were concerned in one way or another with the promotion, financing, construction and operation of the terminal regarded the Union Pacific as the real party in interest. On no other theory can we explain the course followed by the City in willingly allowing the Union Pacific to exercise so much of the actual control of affairs at every stage of the project;[1] its refusal to spend the taxpayers' money for anything except governmental services, like streets and sewers;[2] its acceptance of Union Pacific money in the form of so-called conditional loans to cover official expense.[3]

On no other theory can it be comprehended why one of the City Commissioners, Mr. Schaible, who held office from the inception of the project to April, 1939, when subsequently out of employment, applied to Mr. Stanley for a

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[1] Findings of Fact 10-14, R. 343-9.

[2] In May, 1938, before the grant of federal funds or the advance of $3,000,000 by the Union Pacific in return for revenue bonds, it was proposed to the Board of City Commissioners that a start be made on the terminal project by issuing general obligation bonds for enclosing sewer-laden Jersey Creek. Two of the Commissioners objected because "they had represented to the citizens that the food terminal would be financed by revenue bonds and that to start out by issuing about $100,000 in general obligation bonds might precipitate some criticism."—Stanley to Haugh, May 5, 1938, R. 1591. Jersey Creek was finally enclosed, not with general obligation bonds but with the proceeds of the Public Works Administration grant and of the sale of revenue bonds to the Union Pacific.

[3] Finding of Fact 12, R. 346.

position as manager of the market—that is, of the facilities south of Jersey Creek owned and nominally operated by the City.[1] In no other way can we explain the manner in which the investment bankers sought out the Union Pacific rather than the City officials [2] or the way in which the shippers sought out the railroad rather than the City. The shippers understood that the Union Pacific was really in charge of making arrangements for the payments of rebates and concessions.[3]

The City's function was largely that of a front. As Mr. Haugh stated with meticulous exactness in an analysis of the situation for the President of the Union Pacific, the City officials "do not have the time, the information or the routine for handling the multitudinous details that are required to get the thing set up and contracts let. Mr. Stanley and I will have to do this for them subject to their concurrence and approval." [4] He was then speaking of the promotion,

[1] Stanley to Schaible, Oct. 24, 1939, Ex. 13, R. 1943-4.

Mr. Stanley apparently had some one else in mind, for he told Mr. Schaible that the appointment would be made by the City, but Mr. Schaible had been on the inside long enough to know that while the City would pass the resolution the Union Pacific would dictate the appointment—this being the very reason why he addressed his application to Mr. Stanley.

[2] The Union Pacific conducted most of the negotiations with Stifel, Nicolaus & Company looking toward their purchase of the revenue bonds. Finding of fact 12, R. 344; Ex. 2, pp. 34, 36, 49, R. 1509, 1510-11, 1521-2; Ex. 3, R. 1537-39; Ex. 3, R. 1533, 1537-39; Ex. 13, R. 1813-14, 1819-21, 1823-25; Ex. 4, pp. 10, 20, 21, R. 1561, 1567, 1568-69; Ex. 5, R. 1583; Ex. 62-B, p. 12, R. 2536; Ex. 5, R. 1592-93, 1595-96; Ex. 28, R. 2187-93; Ex. 29, R. 2217-18; Ex. 5, R. 1601; Ex. 13, p. 97, R. 1860-61; Ex. 6, R. 1603-4; Ex. 68, R. 2728; Ex. 17, R. 2051; Ex. 6, R. 1620; Ex. 7, R. 1642; Cravens, R. 485-90; Cravens, R. 487; Cravens, R. 487-88; Cravens, R. 487-93; Ketcham, R. 544-548; Ketcham, R. 548; Cravens, R. 480, 489.

[3] For instance Widlansky was taken by DeOreo to confer with Stanley about the so-called adjustments. R. 1069. The Winick Brothers came to see Mr. Stanley about concessions for their firm (R. 1070), as did Litman (R. 1070). Dudley Brown, a leading produce broker, afterwards a member of the Stanley-Brown-Cooksey committee which carried on the final negotiations with the shippers, at first expressed considerable dissatisfaction because "The Union Pacific had hidden behind the skirts of Kansas City, Kansas, in promoting the market." Weedin to Mitchell, Nov. 30, 1938, Ex. 14, p. 46, R. 2003.

[4] Haugh to Jeffers, Jan. 27, 1938, Ex. 4, p. 15, R. 1564.

financing, and construction of the terminal, but what he said is a frank, realistic description by an astute business man of the relative roles of the two appellants throughout every phase of the project. It coincides with what Stanley told the secretary of one of the produce companies about why he was conducting the negotiations for concessions with the shippers—"It was just a matter of accommodation for Kansas City, Kansas; that it was a big proposition, and they wanted to get it closed up; that the City did not have the organization or the men to handle all the details in the time they had to do it in or at the time they wanted to do it."[1]

What actually occurred with respect to the concessions which were ostensibly to be made by the City was reduced by the District Court to the simplest terms in a penetrating analysis of the facts surrounding the proposed cash bonuses:

> "When the time came for the making of the payments to the Missouri dealers, the Union Pacific knowing it could not legally make them said in effect to the City, its joint adventurer—'It is absolutely necessary that the Missouri dealers be moved to the Food Terminal. Here is a method by which we can pay them to move and avoid the letter of the Elkins Act. You pay them, I cannot. I will help you carry out all of the necessary details. Here is another plan by which you can get the necessary funds without cost to you. If it costs anyone anything it will be my loss and I will assist you in carrying out that plan also. Then when we get the necessary funds I will, with the assistance of two friendly prospective tenants, carry on the necessary negotiations with the Missouri dealers and you need do nothing other than formally make the payments.'"[2]

When this critical moment arrived the Union Pacific officials had three choices open to them: (1) they could

[1] Burns, R. 451.
[2] Memorandum Opinion on Preliminary Injunction, R. 258.

make the payments themselves; (2) they could find a device whereby the payments would be made, ostensibly at least, by someone else; (3) they could turn back and give up any idea of carrying out the promises that their agents had made. They drew back from the first course because they well knew it to be illegal. This narrowed their choice to one between finding a device whereby the payments could be made and turning back entirely. They knew or should have known that only one of these remaining courses was lawfully open to them—that being the complete abandonment of the program of concessions, leaving the food terminal to stand on its own merits and to succeed or fail in a field of fair competition.

The illegality of the device to which they resorted is plain from the literal wording of the controlling statutes which outlaw any rebate or concessions with respect to transportation, whether offered or given "directly or indirectly by any special rate, rebate, drawback or other device,"[1] or "in any manner or by any device",[2] or by any device whatever,[3] wholly regardless of the form or instrumentality employed.

This Court said soon after the Elkins Act was passed that: "The all embracing prohibition against either directly or indirectly charging less than the published rates shows the purpose of the statute was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be brought about."[4] A little later it declared that: "the act seems to reach all means and methods by which the unlawful preference of rebates, concessions, or discrimination is offered, granted, given, or

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[1] Interstate Commerce Act, Sec. 2, 49 U. S. C. 2.
[2] Id., Sec. 6(7).
[3] Elkins Act, Sec. 1(1), 49 U. S. C. 41.
[4] *New York, N. H. & H. R. Co.* v. *Interstate Commerce Commission* (1906), 200 U. S. 361, 392.

received."[1] Still later, the Court held that: "It is the object of the Interstate Commerce Act and the Elkins Act to prevent favoritism by any means or device whatsoever, and to prohibit all practices which run counter to the purpose of the act to place all shippers upon equal terms."[2]

The lower federal courts have expressed the same rule in similarly striking language: "It is the manifest purpose of the statute to strike through all pretense and all ingenius devices to the substance of the transaction."[3] "The act accomplishes its end by directly and unmistakably condemning results, whereby every devisable plan to produce the objectionable conditions is under its ban."[4]

In this state of the law as to which the Union Pacific attorneys had previously advised Mr. Haugh[5] there was but one course legitimately open—to turn back.

But the Union Pacific officials were not willing to give up their efforts to accomplish that which the Act aims to prevent. They had already committed themselves by promises made to the shippers. As Mr. Haugh said, they deemed the concessions "very important"[6]—too important for the success of the terminal to be given up. They had already taken many chances with the negotiations, with the free trips, the free advertising, and the like, and they felt compelled to take another. And so they made their choice, going ahead with what was unmistakably a device to give rebates and concessions in violation of the law.

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[1] *Armour Packing Co.* v. *United States* (1908), 209 U. S. 56.

[2] *United States* v. *Union Stock Yard and Transit Co.* (1912), 226 U. S. 286, 309.

[3] *United States* v. *Milwaukee Refrigerator Co.* (1905), 142 Fed. 247.

[4] *United States* v. *Hocking Valley Ry. Co.* (1911), 194 Fed. 234; affirmed 210 Fed. 735; certiorari denied 234 U. S. 757.

[5] Spencer to Haugh, et al., June 28, 1939, R. 1742-3.

[6] "General situation now appears more favorable than at any time as to allowing adjustments which are very important. We are working all possible to conclude adjustments before Saturday."—Haugh to Jeffers, Dec. 8, 1939, Ex. 12. R. 1775.

2. Union Pacific and City Participated in Conspiracy With Other Defendants Below To Offer and Give Concessions.

The District Court found as a fact that the Union Pacific and the City and its officials, in conjunction with De-Oreo and Fean and other persons and corporations, acted and conspired together to induce the shippers to move from the old produce district to the new Kansas City Food Terminal by means of the various concessions.[1] The Court held that the offering and giving of the concessions and the whole course of transactions connected therewith constituted a conspiracy to violate the Interstate Commerce Act and the Elkins Act.[2]

The appellants contend that this holding was in error because the objective was lawful rather than unlawful, because the City was within its lawful rights in offering and giving concessions and the Union Pacific and the others who joined in the scheme were within their legal rights in assisting the City to carry out its lawful objective. The entire attack on the Court's holding is thus predicated on the asserted legality of the concessions, and is entirely dependent on the maintenance of that proposition.

As has already been shown, however, all of the concessions were unlawful, including those offered or given separately by the Union Pacific as well as those offered or given by the Union Pacific and the City together. The Union Pacific and the City and those who were associated with them, beyond question formed a combination, engaged in a concert of action, and committed innumerable overt acts looking toward the offering, granting, and giving of the rebates and concessions. They thus engaged in a conspiracy to commit unlawful acts.

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[1] Finding of Fact 20, R. 352-4.

[2] Conclusion of Law 4, R. 367-8; Conclusion of Law 7, R. 369; Conclusion of Law 9, R. 370.

In another sense, in view of the fact that the purpose was to employ the concessions as a means of inducing the shippers to move to the new terminal, they employed illegal means to achieve a lawful purpose—securing tenants for the terminal, which in itself and so long as no improper methods are employed, is entirely lawful.

The appellants apparently admit, as they must, that they were engaged in a conspiracy if they combined to do an unlawful act or to accomplish a lawful objective by illegal means.[1] What they have done comes squarely within the definition of conspiracy in *Duplex Co.* v. *Deering*,[2] where this Court defined it as follows:

> "* * * The accepted definition of a conspiracy is a combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means. * * * If the purpose be unlawful it may not be carried out even by means that otherwise would be legal; and although the purpose be lawful it may not be carried out by criminal or unlawful means."

In *Thomas* v. *United States*,[3] the Court held that intermediaries who arrange for the payment of fictitious loss and damage claims by railroads to shippers are guilty of conspiracy to violate the Elkins Act. The defendant Thomas and one Taggart were indicted for conspiring with shippers to have them accept rebates, concessions, and discriminations from divers railroads in violation of the statute. Thomas and his associate were neither carriers nor shippers. They entered into a contract with the shippers, lawful

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[1] Appellant's brief, pp. 233-5.

[2] (1921) 254 U. S. 443, 465. This definition has been repeated in other cases in substantially the same form: *United States* v. *Hutto* (1921), 256 U. S. 524, 528; *Pettibone* v. *United States* (1893) 148 U. S. 197.

[3] 156 Fed. 897 (C. C. A. 8th, 1907).

on its face, whereby they were given the exclusive right to route all of their traffic over the lines of railroads selected by them, and obligated to collect from the railroads claims for loss and damage which the shippers might suffer in connection with the shipments. Actually, however, they did not look after the loss and damage claims but paid considerable sums to the shippers as rebates of the freight charges on shipments carried in accordance with their routing directions. While the conviction below was reversed because of an improper charge respecting presumption of innocence, the Circuit Court of Appeals overruled the assignment of error on the question of conspiracy, saying in part:

> "• • • We are not unmindful of the contention of defendants' counsel that there was no direct evidence of any unlawful undertaking with Thomas, and no direct evidence that Thomas paid Barton Bros. any money as rebates or concessions on freight charges. For argument's sake, this might be conceded. Conspirators do not act that way. Fraud is not often proven by direct testimony. A preconcerted plan to do an unlawful act must from the nature of the case be usually established by inferences drawn from the relation of the parties from the acts done and from the results achieved.
>
> "'It is not necessary to constitute a conspiracy that two or more persons should meet together and enter into an explicit or formal agreement for an unlawful scheme. • • • It is sufficient if two or more persons in any manner or through any contrivance positively or tacitly come to a mutual understanding to accomplish a common and unlawful design.'" (p. 910.)

"It is earnestly contended that there was not sufficient evidence to connect defendant Taggart with the particular conspiracy charged in the indictment. While the proof does not connect him with the incipiency of that conspiracy, it is claimed by the government that facts appear from which it may be reasonably inferred that he came into it after it was concocted with full

knowledge of its existence and character and with a purpose of furthering its design. If such are the facts, he was as much a conspirator as if he participated in its original formation." (p. 912.)

The conspiracy alleged and proved by overwhelming evidence in the case at bar is not one where the Union Pacific assisted the city to carry out a lawful objective, but one where the Union Pacific, the city and their associates combined together to do things which none of them might lawfully do. Even if the appellants were right in their contention that the city may lawfully give concessions to shippers to locate at the terminal which it partly owns and operates, there would still be an unlawful conspiracy under the facts of this case where the city has acted in concert with the Union Pacific to do things which the latter is admittedly forbidden by law to do. The incapacity of a person to commit a substantive offense does not imply that he may with impunity conspire with others who are able to commit it, as this Court has said on more than one occasion.[1]

It has been repeatedly held that one not a bankrupt may be held guilty of conspiring that a bankrupt shall conceal property from his trustee.[2] It has likewise been held that

[1] *Gebardi* v. *United States*, (1932) 287 U. S. 112, 120-121; *United States* v. *Holte* (1915), 236 U. S. 140, 144-5; *Williamson* v. *United States* (1908), 207 U. S. 425, 446-7.

In the *Gebardi* case, *supra*, the Court said at pp. 120-21:

"As was said in the *Holte* case (p. 144), an agreement to commit an offense may be criminal, though its purpose is to do what some of the conspirators may be free to do alone. Incapacity of one to commit the substantive offense does not necessarily imply that he may with impunity conspire with others who are able to commit it. For it is the collective planning of criminal conduct at which the statute aims. The plan is itself a wrong which, if any act be done to effect its object, the state has elected to treat as criminal, *Clune* v. *United States*, 159 U. S. 590, 595. And one may plan that others shall do what he cannot do himself. See *United States* v. *Rabinowich*, 238 U. S. 78, 86, 87."

[2] *Tapack* v. *United States*, 220 Fed. 445, certiorari denied 238 U. S. 627; *Jollit* v. *United States*, 285 Fed. 209, certiorari denied 261 U. S. 624; *Israel* v. *United States*, 3 Fed. (2d) 743; *Kaplan* v. *United States*, 7 Fed. (2d) 594, certiorari denied 269 U. S. 582.

one not an officer of a national bank may be convicted for conspiring with one who is an officer to commit a crime which only the latter could commit.[1]

It is, of course, immaterial that there was no formal contract or agreement between the parties for concerted action in offering or giving the concessions, for that is not essential to the formation of a conspiracy. A combination may be found to exist if there is a concert of action and all of the members work together understandingly for the accomplishment of a common purpose.[2] Where a conspiracy has been formed, the entry of a new member does not create a new conspiracy,[3] does not change the status of the other conspirators,[4] and the new member is as guilty as though he was an original conspirator.[5] It need not appear that all the conspirators joined in the overt act.[6]

3. The City Aided and Abetted the Union Pacific in Offering or Giving Concessions to Shippers.

There is yet another ground upon which the City is guilty of violating the federal statutes, quite irrespective of whether or not it could lawfully give concessions to the shippers for moving to the new terminal. The evidence

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[1] *Chadwick* v. *United States*, 141 Fed. 225.

[2] *United States* v. *Socony Vacuum Oil Co.* (1940), 310 U. S. 150, 177, 223-4; *Marino* v. *United States* (C. C. A. 9th, 1937), 91 Fed. (2d) 691, 694.

[3] *Marino* v. *United States*, *supra*, p. 696; *Hagen* v. *United States* (C. C. A. 9th, 1920), 268 Fed. 344.

[4] *Marino* v. *United States*, *supra*; *Coates* v. *United States* (C. C. A. 9th, 1932), 59 Fed. (2d) 173, 174; *Johnson* v. *United States* (C. C. A. 9th, 1932), 62 Fed. (2d) 32, 34; *Craig* v. *United States* (C. C. A. 9th, 1936), 81 Fed. (2d) 816, 822, certiorari denied, 298 U. S. 690.

[5] *Marino* v. *United States*, *supra*; *Hagen* v. *United States*, *supra*; *Coates* v. *United States*, *supra*; *Metzler* v. *United States* (C. C. A. 9th, 1933), 64 Fed. (2d) 203, 206.

[6] *United States* v. *Rabinowich* (1915), 238 U. S. 78, 86; *Bannon* v. *United States* (1895), 156 U. S. 464, 468.

thoroughly establishes the proposition that the person primarily interested in giving the concessions was the Union Pacific, who wanted to obtain the increased traffic which would naturally result from the location of the shippers at the terminal. This Union Pacific traffic motive was, as already shown, the controlling factor behind all of the concessions. The Union Pacific had already promised the concessions before the City entered into the picture, and what the City did was largely out of a desire to assist the Union Pacific in carrying out those promises and in reaping the traffic gains. It thus aided and abetted the Union Pacific in carrying out its unlawful purpose of giving the concessions. In so doing, the City violated the law, irrespective of whether what it did might have been lawful and proper if it were acting alone.

Whoever aids or abets the commission of an act constituting an offense defined in any law of the United States is as responsible as the principal.[1] Under the statute, any person assisting in the commission of a prohibited act is equally responsible with the principal.[2] Those who aid a corporation in violating the federal license law are held guilty as principal offenders.[3] One may be incapable of committing a particular offense and yet under this statute responsible as a principal by reason of lending assistance to another in committing it.[4] One who aids and abets in violation of the Elkins Act may be charged either as the principal

[1] "Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal." Revised Statutes, Sections 5323, 5427; March 4, 1909, c. 321, Section 332, 35 Stat. 1152; 18 U. S. C., 550.

[2] *United States* v. *Hodorowicz* (C. C. A. 7th, 1939), 105 Fed. (2d) 218, certiorari denied, 308 U. S. 584.

[3] *Wood* v. *United States* (C. C. A. 4th, 1913), 204 Fed. 555, certiorari denied, 232 U. S. 731.

[4] *Haggerty* v. *United States* (C. C. A., 7th, 1925), 5 Fed. (2d) 224.

or as an aider and abetter, since the statute makes aiders and abetters principals.[1]

Even if the facts were otherwise and if the evidence were, as the appellants contend, to the effect that the City was the principal and the real party in interest in giving the concessions because of its desire to make the terminal a success, the Union Pacific could not in that event escape responsibility. The assistance which the Union Pacific admittedly gave to the City in offering and giving the concessions places it in the position of an aider and abettor and therefore as responsible as a principal since, as we have already shown to be the case, the City could not lawfully give the concessions.

4. *Union Pacific and City Jointly Liable for Concessions Because They Engaged in Promotion and Operation of Terminal as Joint Venture or Joint Enterprise.*

Apparently because they find the ground more comfortable to rest on than any other place, and despite the fact that the District Court did not primarily rely upon it as a basis for its conclusions, the appellants nevertheless devote an extraordinary and disproportionate amount of attention to the subject of joint venture. With prodigious effort they build up a straw man, and at greater length they proceed to tear him to pieces. They ignore the fact that the Court placed joint venture fourth in its grounds for holding both parties responsible for the concessions, placing ahead of it

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[1] In *United States* v. *Lehigh Valley R. Co.* (1930), 43 Fed. (2d) 135, the defendants were indicted for a violation of the Elkins Act. Motions to quash the indictments were dismissed. At page 144, the court said:

"Joseph A. Fischer, defendant, contends that he, having been made a principal by the Act of Congress, can not be charged as an aider and abettor. One who aids and abets may be charged either as a principal or as an aider and abettor, since by statute aiders and abettors are made principals. (18 U. S. C. A., Sec. 550.) Alleging that defendant aided and abetted does not negative participation as a principal."

device,[1] conspiracy,[2] and direct participation[3] in the acts by both parties.

But even then they base their argument upon a misconstruction of the holding of the District Court on the question of joint venture. They proceed upon the assumption that the Court held the Union Pacific and the City to be engaged in a partnership, or in a joint venture in the sense of a special commercial partnership of limited scope, in the construction and operation of the food terminal. There is no warrant for any such assumption when all of what the Court said upon the subject is considered.

The Court did say in its preliminary opinion that after Fean and DeOreo dropped out as promoters "the project continued as a joint venture of the Union Pacific and the City;"[4] it referred to the Union Pacific and "the City as joint adventurers."[5] But in its conclusions of law the Court clearly indicated that it did not rely upon the existence of a strictly technical commercial joint venture but considered the joint activities and mutual delegations of responsibilities by the parties sufficient to require a holding that certain acts of the City were the acts of the Union Pacific. It thus found that the parties had together engaged

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[1] The Court said, in granting the preliminary injunction, "The evidence clearly demonstrates that this arrangement was adopted and carried out with the exception that the City officials took a more active part and performed more of the actual labor than was necessary. Whether it be characterized as a joint adventure or a conspiracy is of little moment. Certainly, it was a device within the meaning of the Elkins Act * * *" R. 258. See also, Findings of Fact 18 and 19, R. 350-51; Findings of Fact 28-33, R. 357-9; Conclusion of Law 2, R. 366; Conclusion of Law 6, R. 369; Conclusion of Law 10, R. 370-71.

[2] See statement of District Court, quoted in last preceding note. See also, Finding of Fact, 20, R. 352-4; Conclusion of Law 4, R. 367; Conclusion of Law 7, R. 360.

[3] Memorandum opinion granting preliminary injunction, R. 248-50; Findings of Fact 18 and 19, R. 350-51; Finding of Fact 26, R. 356-7; Conclusion of Law 3, R. 367; Conclusion of Law 12, R. 371.

[4] R. 257.

[5] R. 258.

in a "joint venture, joint undertaking, joint enterprise, and joint project."[1] The very use of these synonyms as well as the context and connection of their use negatives any inference that the Court meant to hold that there was a joint venture in the strict sense of a special commercial partnership with a pooling of profits and losses.

If the test of a joint venture is, as the appellants contend, the concurrence of three essential elements, (1) joint ownership of property—legal or equitable—or right to possession, (2) agreement to pool and share in profits and losses, and (3) legal right of supervision and control, then it must be at once conceded that there is no joint venture in this case. Two of the supposedly essential elements are absent—joint ownership of the property and agreement to pool profits and losses. The Union Pacific owns the property north of Jersey Creek, the City owns what is to the south. There is no agreement to pool profits and losses.

While the appellants insist that the concurrence of all three of these elements is necessary to the existence of a joint venture or a partnership, they neglect entirely any consideration of the extent, if any, to which they are necessary ingredients of some other form of joint activity, such as a joint enterprise, joint undertaking, or joint project, where those engaged are subject to legal liability for the acts of each other done in pursuance of the common objective. One or the other of these forms of joint or associated activity not amounting to a partnership nor even to a joint venture in the sense of a special commercial partnership of limited scope, is a definitely recognized legal relationship under the laws of Kansas as well as of other States, regarded as imposing joint liability for acts done within the

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[1] Conclusion of Law 8, R. 370.

The conclusion of law on this point was the same when the preliminary injunction was granted (R. 283).

scope of the undertaking. Sometimes the courts use the term "joint venture" in describing such an activity, under the theory that it really amounts to a special form of joint venture. In other cases, a distinguishing term such as "joint enterprise" or less frequently, "joint undertaking" or a "joint project" is employed.

While the Court below used the term "joint venture," it also, in an effort—apparently vain so far as appellants are concerned—to prevent misunderstanding, used the other three terms as well. The failure of the appellants to recognize the distinction between the two kinds of joint venture or between joint venture on the one hand and joint enterprise, joint undertaking or joint project on the other or to observe what the Court actually held makes their argument for the most part almost, if not entirely, irrelevant to the real issue on this branch of the case.

In *Howard* v. *Zimmerman*,[1] the Supreme Court of Kansas, despite the absence of two, and apparently three, of the tests which appellants so strongly insist are required by the law of the State, held that a joint enterprise, imposing joint liability, is created when persons participate as associates in an undertaking with equal privilege to control the method and means of accomplishing the common design. In that case, two boys together borrowed an automobile owned by a third person and took two girls riding. An accident occurred involving injury to persons in another car, and both boys were sued for damages. The Court held that they were both liable, predicating its decision on the basis already mentioned. It declared that the term "joint enterprise" could not be exactly defined and "is not helpfully elucidated by definition," but comes into being where there is an undertaking participated in by

[1] (1926) 120 Kan. 77, 242 Pac. 131.

associates acting together with equal privilege of control.[1] The decision does not turn on any question of legal right to joint control but on the actual existence of equal opportunity to direct the course of events, such as the Union Pacific had in connection with the concessions and in connection with every phase of the terminal project.

The question, however, is one to be determined under Federal rather than State law. It involves the existence of joint responsibility of the Union Pacific and the City for violation of the Federal statutes against rebates and concessions and is basically a question of statutory interpretation in a situation where uniformity of decision is necessary to the attainment of the statutory objectives of equality of treatment of all shippers and carriers in interstate commerce, and the end of favoritism and discrimination.[2]

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[1] The Court said at, page 131:

"The term 'joint enterprise' is not helpfully elucidated by definition. An enterprise is simply a project or undertaking, and a joint enterprise is simply one participated in by associates acting together. The basis of liability of one associate in a joint enterprise for the tort of another is equal privilege to control the method and means of accomplishing the common design. If the means employed be an instrumentality negligent use of which inflicts injury, the associate whom the law regards as participating in the conduct of the actor must have had equal control over its use. This control, however, need not have extended to actual manipulation at the time injury was inflicted. It is sufficient that, at the beginning of the enterprise, or as it progressed, or at any time before the tortious event, he possessed equal authority to prescribe conditions of use."

The supposedly necessary elements of joint ownership of the property and pooling of profits and losses were also absent in two other automobile cases—in *Hopkins* v. *Golden* (1917), 281 Mich. 389, 275 N. W. 184, where the court held that a fishing trip at joint expense made in an automobile owned by one of the parties was a joint enterprise, and in *Coleman* v. *Bent* (1924), 100 Conn. 527, 124 Atl. 224, where a similar trip was held to be a joint adventure. In *Tannehill* v. *Kansas City, C. & S. Ry. Co.* (1919), 79 Mo. 158, 213 S. W. 818, the court held that two brothers were engaged in a joint enterprise in making a trip for business or pleasure in an automobile which they owned jointly with a third brother, and, therefore, the negligence of one of the joint enterprisers was imputable to the other.

[2] *Lyeth* v. *Hoey* (1938), 305 U. S. 188, 194; *Mo. Kans. & Tex. Ry.* v. *Harriman*

In the Federal courts and in jurisdictions other than Kansas, there are many decisions which, like the one of the Supreme Court of Kansas in *Howard* v. *Zimmerman*,[1] already reviewed, hold that a joint enterprise imposing joint liability may exist without the concurrence of the elements embodied in the appellants' test. For the most part, they are cases which, like the one at bar, do not involve a suit between the parties for a division of property or profits. In many of them, there is a finding of joint venture or joint enterprise, in the absence of joint ownership of the property involved.[2] In many, the existence of joint venture or joint enterprise is found without the presence of pooling of profits and losses.[3]

In any kind of a joint enterprise, more than a common purpose or design is required. But there need only be (1) an undertaking for the mutual benefit or pleasure of the parties and (2) equal privilege of control over the means of accomplishing the common design. The concurrent presence of these two elements is sufficient to create a joint enterprise, with each party responsible for the acts of the

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(1913), 227 U. S. 657, 672; *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.* (1907), 204 U. S. 426, 439. See also the discussion, Point VI of this brief.

[1] (1926) 120 Kan. 77, 242 Pac. 131.

[2] *Joring* v. *Harriss* (C. C. A., 2d, 1923), 292 Fed. 974; *Bank of America Nat. Trust & Savings Assn.* v. *Fisher* (C. C. A. 9th, 1932), 61 Fed. (2d) 53; *Denny* v. *Guyton* (1931), 327 Mo. 1030, 40 S. W. (2d) 562; *Jackson* v. *Hooper* (1909), 76 N. J. Eq. 185, 74 Atl. 130; *Beierle* v. *Hockenedel* (Ohio, 1927), 157 N. E. 573; *Alderton* v. *Williams* (1905), 139 Mich. 206, 102 N. W. 753; *Reid* v. *Shafer* (C. C. A. 8th, 1918), 249 Fed. 553; *New York Indemnity Co.* v. *Industrial Accident Commission* (1932), 126 Cal. App. 37, 14 Pac. (2d) 160; *O'Brien* v. *Woldson* (1928), 149 Wash. 192, 270 Pac. 304, 62 A. L. R. 436; *Coleman* v. *Bent* (1924), 100 Conn. 527, 124 Atl. 224; *Hopkins* v. *Golden* (1937), 281 Mich. 389, 275 N. W. 184.

[3] *Tannehill* v. *Kansas City, C. & S. Ry. Co.* (1919), 79 Mo. 158, 213 S. W. 818; *Hopkins* v. *Golden* (1937), 281 Mich. 389, 275 N. W. 184; *Bosteder* v. *Duling* (1928), 219 N. W. 806; *Coleman* v. *California Yearly Meeting of Friends Church* (Cal. App. 1938), 81 Pac. (2d) 469; *New York Indemnity Co.* v. *Industrial Accident Commission* (1932), 126 Cal. App. 37, 14 Pac. (2d) 160.

other within the scope of the undertaking.[1] Although it is not an essential element of the relationship, and although standing alone it is not controlling, the advance of funds to be paid only out of profits of an enterprise is a strong

[1] *Howard* v. *Zimmerman* (1926) 120 Kan. 77, 242 Pac. 131; *Coleman* v. *California Yearly Meeting of Friends Church* (Cal. App. 1938), 81 Pac. (2d) 469; *New York Indemnity Co.* v. *Industrial Accident Commission* (1932), 126 Cal. App. 37, 14 Pac. (2d) 160; *Moore* v. *Hillsdale County Telephone Co.* (1912), 171 Mich. 388, 137 N. W. 241; *Pawley* v. *Glasscock* (1931), 236 Ky. 821, 34 S. W. (2d) 729; *Hopkins* v. *Golden* (1917), 281 Mich. 389, 275 N. W. 184; *Coleman* v. *Bent* (1924), 100 Conn. 527, 124 Atl. 224; *O'Brien* v. *Woldson* (1928), 149 Wash. 192, 270 Pac. 304, 62 A. L. R. 436.

In *Coleman* v. *California Yearly Meeting of Friends Church, supra*, a carpenter who, although not a member, attended a Quaker meeting, responded to an appeal to help in building a new meeting house. While engaged with others who had similarly offered their services in construction work, he sustained an injury from a fall and brought suit against the Church, claiming negligence. The Court denied recovery, because a joint enterprise or joint venture arose from the presence of (1) community of interest in the undertaking and (2) equality of right to direct and govern the construction work. The Court said in part:

"As to plaintiff, the pastor, and the other members of the meeting or congregation who donated their labor, this project was, within the meaning of the law of negligence, a joint enterprise, because there was present here a community of interest in the objects or purposes of the undertaking. There was also equality of right to direct and govern the movements and conduct of each other with reference thereto—that is to say, while appellant could not supervise the conduct of anyone else interested in the construction of the church, neither did those others have authority to direct appellant, either as to the time when he would come to work, how long he would work, the quality of work he should do, or the time when he should quit work."

An informal association of persons residing in a rural community for the construction and operation of a telephone line, contemplating no division of profits but merely mutual benefit in the form of telephone service, is a joint adventure. *Moore* v. *Hillsdale County Telephone Co.* (1912), 171 Mich. 388, 137 N. W. 241; *Pawley* v. *Glasscock* (1931), 236 Ky. 821, 34 S. W. (2d) 729.

Some tort cases indicate that it is not necessary for there to be any joint right of control if there is a joint undertaking with a joint or common purpose. *Washington & O. D. Ry.* v. *Zell*, 118 Va. 755, 88 S. E. 309; *Wentworth* v. *Waterburg*, 90 Vt. 60, 96 Atl. 334; *Jensra* v. *Chicago, M. & St. P. Ry.*, 733 Wash. 208, 233 Pac. 635. In the latter case the Court specifically said that joint right of control is unnecessary. In *Hagerman* v. *Schulte*, 349 Ill. 11, 181 N. E. 677, the Court found three persons were joint adventurers in a business deal so that a fiduciary relationship existed although there were written contracts defining their rights and they did not, according to testimony (see dissent p. 34), consider themselves partners.

indication of the existence of a joint venture or a joint enterprise[1].

In the present case there are present four elements which, at least when combined together, are sufficient to create a joint venture or a joint enterprise: (1) ownership of part of the terminal by the Union Pacific, coupled with its possession of a beneficial interest in the other part; (2) an advance of funds by the Union Pacific to be repaid by the City solely out of profits of the enterprise, and thus subject to all of the risks of the business; (3) a sharing by the Union Pacific with the City of the benefits of operation of the entire terminal; and (4) actual joint operation and control of the terminal.

At the threshold stands the fact that the Union Pacific and the City are together engaged in the operation of a railroad terminal which is an integral whole, a single functional unit.[2] Integrated operation is not left to chance. In the agreements under which the terminal was built—the contract whereby the Union Pacific purchased three million dollars of revenue bonds from the City,[3] and the instrument by which the Union Pacific leased the body of land north of Jersey Creek for a team track yard,[4] the City

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[1] Joint Adventures, 33 C. J., p. 843; *Alderton* v. *Williams* (1905), 139 Mich. 266, 102 N. W. 753; *Irvine* v. *Campbell* (1913), 121 Minn. 192, 141 N. W. 108, Ann. Cas. 1914C 669; *Nelson* v. *Lindsey* (1917), 179 Ohio 862, 162 N. W. 3. In the article in Corpus Juris, the rule is summarized as follows:

"(§ 5). Money Subject to Loss. If the person receiving the money assumes no obligation for its return and it is subject to the risks of the business, the parties have usually been held to be joint adventurers, notwithstanding the contract provides that the money is to be returned with interest before the net profits are divided, or that the lender is to receive notes as security for the money invested, or is to be given a lien upon the property put into the venture."—Joint Adventures, 33 C. J., p. 843.

[2] Finding of Fact 8, R. 342-3.

[3] Ordinance 30206, Section 2, Exhibit 62-B, R. 2561; Ordinance 30239, Exhibit 62-B, R. 2591-8; Ordinance 30251, Exhibit 62-B, R. 2600-605.

[4] Ordinance 30257, Section 1, Exhibit 62-B, R. 2585; id., Section 7, R. 2589; Ordinance 30276, Section 1, Exhibit 62-B, R. 2608-9; id., Section 7, R. 2612.

obligated itself to build the warehouses, trackage, and other facilities south of Jersey Creek and to devote them for terminal or market purposes for a period of at least thirty years, and the Union Pacific obligated itself during such period to furnish railroad service. Under these contracts the terminal is required to be operated as a unified whole, with both parties necessarily participating in the operation.

Not only is this so, but it is also true that the Union Pacific has a special interest in the terminal facilities south of Jersey Creek which are nominally owned by the City. It has the clear contractual right to the exclusive use for railroad purposes[1] of what the appellants on brief refer to as "terminal trackage south of Jersey Creek,"[2] It not only procures the use of the warehouses and the other so-called market facilities in such a way as to increase its traffic, but it gets all of the net earnings from them for at least twenty-two years and probably much longer.[3] Since the value of a thing is in its use, the Union Pacific is to enjoy all of the tangible rights of ownership for over a quarter of a century. While it does not have legal title, it has a real and substantial beneficial interest in these facilities quite sufficient to support a joint adventure or joint enterprise.

The extent of the railroad's interest is made even clearer by considering it from another angle—from the standpoint of the rights which remain to the City after the Union Pacific's purchase of the $3,000,000 issue of revenue bonds. The County of Wyandotte, so the appellants say—and we are not concerned to combat the proposition—owns the legal title. Obviously it enjoys none of the fruits of ownership. The City has the right of management and control, which, in view of all of its entanglements, is a burdensome responsibility. It can not devote the property to

[1] Ordinance 30237, Ex. 62-B, R. 2583-91.
[2] Appellants' Brief, p. 153.
[3] Findings of Fact 28-34, R. 357-60.

governmental purposes. It has contracted with the Union Pacific to devote it for at least thirty years to the proprietary business purpose of a food terminal.[1] From the business enterprise in which it has chosen to engage, it gets no net income for the time being. If and when the income from the facilities exceeds the outgo—and that time has not yet arrived—the City's equity in the property begins to increase; but it will certainly be twenty-two years and probably much longer before the lien of the Union Pacific can be lifted from the earnings so that the City may commence to enjoy them.[2] The contention that the City or the County has all of the property rights in these market facilities while the Union Pacific has none thus lacks the saving grace of realism.

The Union Pacific has not only advanced the principal funds for the part of the food terminal owned by the City but it has failed to get in return any promise for the City to pay the money back absolutely and in any event, having been content with a promise for the payment of interest and the repayment of principal out of the proceeds of the venture.[3] The justification for making the outlay on these terms was not the soundness of the investment; because the Union Pacific officials, after their failure to sell the bonds to Stifel, Nicolaus & Company, knew that the bonds were speculative and risky[4]—it was the collateral advantage

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[1] Ex. 62-B, pp. 28-9, Ord. 30206, R. 2557-62; Ex. 62-B, pp. 42-5, Ord. 30237, R. 2583-91; Ex. 62-B, p. 46, Ord. 30239, R. 2591-93; Ex. 62-B, pp. 51-3, Ord. 30251, R. 2600-04; Ex. 62-B, pp. 55-8, Ord. 30276, R. 2606-15.

[2] Finding of Fact 34, R. 359-60.

[3] Finding of Fact 13, R. 346-7.

[4] Finding of Fact 13, R. 346-7. The General Counsel of the Union Pacific in New York wrote to the General Solicitor in Omaha, while the purchase of the bonds by the Union Pacific was being arranged, that it was useless to attempt to make any provision facilitating resale of the bonds within a year because "Messrs. Harriman and Charske discussed this yesterday and feel so sure that there will be no opportunity for us to sell to third party within a year. * * *" —Clark to Bockes, November 9, 1938, R. 1662-3.

expected from the possibility of using the terminal to increase the railroad's freight traffic in perishable food products.[1]

No other single factor is more strongly indicative of the participation of the Union Pacific in the joint adventure than its advance of all of the preliminary expenses and the major part of the construction funds under provision for repayment only out of the profits of the enterprise and subject to all attendant risks and uncertainties.

The Union Pacific was a lender who was not content to lend, an investor who was not content to invest.[2] It not only advanced what in substance was the equity money without which the project could not go forward but it conducted the actual management of affairs in the name and with the approval of the nominal owner of the part of the terminal to which it did not hold legal title.[3] The Union Pacific was the active and dominant party in the enterprise[4]; whereas, the City was for the most part passive, acting only under the spur of suggestions of the dominant party, and then usually only to pass ordinances or resolutions or to take similar formal action.

The appellants now attack the conclusions of the District Court on this issue with a wholly irrelevant argument about the legal right of control of the City over the so-called market facilities south of Jersey Creek, when the issue is one of *de facto*, not *de jure*, control. The lower court pro-

[1] Findings of Fact 28-33, R. 357-9.

[2] *Cf. Southern Pacific Terminal Co.* v. *I. C. C.* (1911), 219 U. S. 498, 523.

[3] *Cf. Chicago, M. & St. P. R. Co.* v. *Minneapolis C. & C. Asso.* (1918), 247 U. S. 490; *United States* v. *Lehigh Valley R. Co.* (1911), 220 U. S. 257, 273; *United States* v. *Delaware, L. & W. R. Co.* (1915), 238 U. S. 516. In the case first cited this Court, in speaking of a subsidiary company used as a mere instrumentality of two owning companies, said, at p. 501: "* * * In such a case the courts will not permit themselves to be blinded or deceived by mere forms of law, but, regardless of fictions, will deal with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require."

[4] Finding of Fact 12, R. 344-6.

ceeded upon the eminently sound theory that it was dealing not with legal right to control but with control actually exercised in the past—with what the parties did, not what they might have done if they had taken a different view of their rights and duties. What the parties had the right to do under the laws of Kansas or under their agreements among themselves is of no consequence in determining whether they violated the Federal statutes; what they actually did is alone of any significance and it is all-controlling.

The evidence shows that the Union Pacific participated jointly with the City and took a dominant part in every phase of the promotion, financing, construction, management, and operation of the Kansas City Food Terminal.

The idea of a new food terminal on the line of the Union Pacific was, it is true, originated by Mr. DeOreo and Mr. Fean; but it is incorrect to suggest that they ever proposed to promote the terminal entirely by their own efforts. Their previous experience had been in assisting various eastern railroads in promoting produce terminals on their lines in a number of cities, notably at Cleveland and Buffalo.[1] They came to Kansas City with the expressly avowed purpose to "make a deal" with the Union Pacific for the promotion of a terminal on its line there.[2] As early as February, 1937, the Union Pacific recognized that it would have to arrange for the financing of any terminal built pursuant to the promotional ideas of Mr. DeOreo and Mr. Fean.[3] While the bills authorizing the project were pending in the Kansas Legislature, the Union Pacific kept Mr. Fean and Mr. DeOreo away from Topeka and gave them to understand that there was no prospect of doing anything unless the bills

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[1] Ex. 2, R. 1493-7; Ex. 6, R. 1610-12.

[2] Ex. 2, R. 1484-5, 1500; Ex. 14, p. 2, R. 1964.

[3] "If the attached bill is passed and made a law, I believe it will be possible to finance the plans of Mr. DeOreo and Mr. Fean."—Stanley to Haugh, February 11, 1937, Exhibit 2, p. 24, R. 1502.

were passed.[1] They lack both the business experience and the other qualifications for playing any major part in the promotion of an enterprise of this size, and they were without commensurate financial resources. Consequently, they were soon relegated to the role of rental agents charged with the duty of obtaining tenants for the produce warehouses and the farmers' market.[2] Even as rental agents, they at all times worked under the close supervision and direction of Union Pacific officials.[3] From the early part of 1938 to the time this suit was filed, Fean and DeOreo received money from the Union Pacific, sometimes in the ostensible guise of conditional loans,[4] sometimes as reimbursement of expenses,[5] and at other times as straight salary.[6] They each received $300 a month as a "conditional loan" from the Union Pacific for two or three months of the short period they were under contract with the City as its leasing agents.[7]

The City officials were dubious or at least passive[8] and, according to a survey made by a Union Pacific official in the summer of 1937, the citizens were apathetic toward the terminal project.[9] They were not willing to spend any substantial amount of municipal funds on the project; they acquiesced and went along only on the basis of a

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[1] "Messrs. DeOreo and Fean remain in Kansas City and clearly understand there is no prospect of doing anything unless these bills pass. I advised them to keep away from Topeka."—Stanley to Haugh, March 5, 1937, Exhibit 2, p. 29, R. 1506.

[2] DeOreo, R. 617-9, 623-4; Fean, R. 577-9, 585-6.

[3] Opinion Below, R. 244; Ex. 13, R. 1905-6; Fean, 256-7; DeOreo, R. 622-3, 630-31, 637, 1177-80.

[4] Ex. 31, R. 2240-43; Fean, R. 582-3, 585; DeOreo, R. 625-6; Boyd, R. 547.

[5] Ex. 21, R. 2102-14; Ex. 31, R. 2243.

[6] Ex. 22, R. 2115-28; Fean, R. 584-5; DeOreo, R. 628-9.

[7] Ex. 31, R. 2240-43; Fean, R. 582-3, 585; DeOreo, R. 625-6; Boyd, R. 547.

[8] Official Journal of Kansas City, Kansas, June 24, 1937, R. 2481-3; Stanley to Haugh, May 5, 1937, Ex. 2, p. 45, R. 1517; Haugh to Jeffers, January 27, 1938, Ex. 4, R. 1564.

[9] Reed, Ex. 14, p. 31, R. 1980.

plan of financing involving relatively little cost to the City.[1] The real initiative, as well as the direction of promotional activities, was in the hands of the Union Pacific officials, particularly Mr. J. L. Haugh, Vice-President, and Mr. Guy E. Stanley, Executive Assistant. They were committed "to a considerable participation in this project before any Federal grant was a part of the plan."[2] They later formed the plan to finance the terminal through the City and the Public Works Administration, and to have the market buildings owned by the City and, hence, free from taxes.[3] In the summer of 1937, Mr. Stanley was already "handling the matter in a most capable, careful and complete manner," having "every detail, fact and minute information at his command."[4] Mr. Haugh, in the early part of 1938, was devoting practically all of his time to the terminal promotion.[5] In July, 1938, he wrote President Jeffers: "Am continuing to work assiduously on this project and hope to bring it to a head in the near future."[6] In the latter part of 1938 he required Mr. Stanley to make a daily report of his activities in connection with the terminal.[7]

The other activities of the Union Pacific officials were legion. They obtained plans from other markets,[8] considered general plans for this market,[9] examined the pertinent statutory law of Kansas, assisted in the preparation of amendments thereto necessary to authorize the construction,[10] assisted in securing introduction and passage of a

[1] Stanley to Haugh, May 5, 1938, R. 1591; Finding of Fact 10, R. 343-4; Finding of Fact 16, R. 349-50; Opinion Below, R. 242-5.

[2] Clark to Spencer, November 3, 1938, Ex. 7, p. 19, R. 1651; see also Haugh to Jeffers, January 27, 1938, Ex. 4, p. 15, R. 1564-5.

[3] Finding of Fact 10, R. 343-4.

[4] Reed, R. 1985.

[5] Jeffers to Charske, February 8, 1938, Ex. 4, p. 19, R. 1567.

[6] Haugh to Jeffers, Ex. 5, p. 32, R. 1601-3.

[7] Stanley to Haugh, December 27, 1938, Ex. 9, p. 4, R. 1689.

[8] Opinion Below, R. 242; Ex. 2, p. 11, R. 1493.

[9] Opinion Below, R. 242-3; Ex. 2, R. 1497-1501.

[10] Opion Below, R. 243; Ex. 2, R. 1501.

bill in the Kansas Legislature making those amendments,[1] assisted in securing the Governor's signature,[2] conferred with prospective purchasers of bonds to be issued by the City under the plan,[3] interested the City officials in the project,[4] introduced Fean and DeOreo to those officials,[5] and obtained estimates of costs and architect's perspective.[5a] It advanced promotion expenses of more than $40,000,[6] including payments to DeOreo and Fean,[7] the expense of advertising the project, inspection trips by City officials and produce dealers to other markets, and of numerous trips to Washington by City officials and others in connection with the City's application for a Public Works Administration grant.[8] It prepared the City's application for the grant[9] and took advantage of the opportunity presented by omitting from the City's estimate any provision for a perishable team track and inspection yard so that it might build the yard itself and more effectually control the rail traffic;[10] furnished data supporting the application;[11] secured endorsements of the project from farmers;[12] was largely instrumental in securing the grant of $1,710,000 for the project;[13] furnished much of the engineering advice and

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[1] Opinion below, R. 243, Ex. 2, R. 1502.

[2] "All of the laws were passed before anyone outside of our organization knew what was going on."—Stanley to Mitchell, August 12, 1937, Exhibit 14, p. 33, R. 1992; Ex. 13, R. 1797.

[3] Opinion Below, R. 243; Ex. 2, R. 1510-11.

[4] Opinion Below, R. 243; Ex. 2, R. 1496-7.

[5] Opinion Below, R. 243; Ex. 2, R. 1496; R. 572, 615-6.

[5a] Opinion Below, R. 243; Ex. 13, R. 1792-4.

[6] Finding of Fact 12, R. 346.

[7] Opinion Below, R. 243; Ex. 6, R. 1609-10.

[8] Opinion Below, R. 243-4; Ex. 21, R. 2114; Ex. 2, R. 1512-17; Ex. 13, R. 1841; Ex. 2, R. 1526, 1531-2; Ex. 13, R. 1840.

[9] Opinion Below, R. 244; Ex. 2, R. 1532-3; Ex. 62-A, R. 2483.

[10] Stanley to Haugh, June 25, 1937, Ex. 2, R. 1533.

[11] Opinion Below, R. 244; Ex. 6, R. 1610-21.

[12] Ex. 13, R. 1808; Skinner, R. 868.

[13] Finding of Fact 13, R. 265-6.

direction;[1] selected the architects,[2] insisted "because of our financial participation in the terminal" and because its officials had "assumed large responsibilities assisting in the expenditure of $3,000,000" that the architects should take the orders of the Union Pacific,[3] controlled the cost of the project[4] and type of construction;[5] *arranged* for a contract between the City and Fean and DeOreo, making the latter rental agents for the terminal on a commission basis,[6] and after cancellation of such contract upon insistence of the Public Works Administration in October, 1938, thereafter kept them on the pay roll of its subsidiary, The Kansas City Industrial Land Company[7], planned to have the terminal managed by an Association of friendly produce dealers,[8] prepared by-laws for the Association,[9] fixed the date of opening of the terminal,[10] caued a large number of its officers, employees, and agents, and those of subsidiary and affiliated companies, to render extensive services in

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[1] Opinion Below, R. 244; Ex. 13, R. 1895-9.

[2] Opinion Below, R. 244; Ex. 10, R. 1726; Ex. 62-A, R. 2481.

[3] "Both Mr. Haugh and Mr. Wellman, like myself, have assumed large responsibilities assisting in the expenditure of $3,000,000. We recommended you as the architects on this job and naturally want you to share our responsibility and assist in every way to affect every economy possible consistent with practical commercial operations such as the Kansas City Food Terminal is intended to be. I would like to suggest that you keep Mr. Wellman advised about changes and all details from time to time, sending copy of the letters to me, and to every extent possible consider his recommendations because of our financial participation in the terminal."—Stanley to Gentry, Voskamp & Neville, June 3, 1939, R. 1921-2.

See also: Ex. 62-A, R. 2481; Ex. 10, R. 1726, R. 1727.

[4] Opinion Below, R. 244; Ex. 13, R. 1901-4.

[5] Opinion Below, R. 244; Ex. 13, R. 1916, 1921-2, 1932-3, 1934-5; Ex. 10, R. 1726, 1727.

[6] DeOreo, R. 636; Stanley, R. 1031, 1063; Ex. 2, R. 1560; Ex. 28, R. 2183.

[7] Finding of Fact 14, R. 348.

[8] Finding of Fact 17, R. 350; R. 1562-4, 2620-21, 619-20, 1535-6, 1541-2, 1169; R. 3204-8.

[9] Haugh to Stanley, December 20, 1938, Exhibit 9, p. 4, R. 1681-7; Reed to Mitchell, October 27, 1937, Exhibit 14, p. 45, R. 2001-2.

[10] Weedin to Mitchell, October 3, 1939, Exhibit 15, p. 28, R. 2027.

connection with the promotional, leasing, financial, and construction activities during the years 1937, 1938, and 1939;[1] and planned and supervised the project from beginning to end.[2]

The Union Pacific had practical charge of the vitally important campaign to secure tenants, without which the terminal could not have succeeded.[3] It prepared the form of leases,[4] procured the execution of many leases, including all leases of office space in the two-story produce warehouse,[5] took a leading part in the negotiations culminating in leasing the large cold storage plant to The City Ice & Fuel Company, furthering the lease by making for itself and one of its affiliates two contracts to buy large quantities of ice from that company.[6]

The Union Pacific conducted extensive negotiations with Stifel, Nicolaus & Company, investment bankers, seeking to induce them to buy $3,000,000 of revenue bonds to be issued by the City to provide the private financing necessary before a Public Works Administration grant could be obtained, agreed to guarantee a large part of the interest and sinking fund charges on such bond issue; and thereafter, after having been advised that such a guaranty would require the approval of the Interstate Commerce Commission, refused to go forward with it,[7] but, instead, elected to purchase the

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[1] Finding of Fact 12, R. 345-6.

[2] Opinion Below, R. 244; Ex. R. 14, R. 1986, 1993; Ex. 15, R. 2010-12, 2015, 2029-30; Ex. 12, R. 1778, 1783.

[3] Ex. 4, R. 1509; Yukon, R. 596-9; DeOreo, R. 622-3, 630-31, 1177-80; Ex. 9, R. 1690, 1701, 1705; Ex. 62-A, R. 2514.

[4] Opinion Below, R. 244; Ex. 13, R. 1857; Ex. 10, R. 1725; Ex. 11, R. 1733-4, 1742; Stanley, R. 1067, 1069; Payne, R. 672-3.

[5] Mr. Stanley assured a prospective tenant of office space that he would "see that your office is fixed up the way you want it."—Stanley to Brown, May 25, 1939, Exhibit 13, p. 174, R. 1918-9.

[6] Finding of Fact 27, R. 357; R. 1609, 2040-45, 2063-5, 538-9.

[7] Opinion Below, R. 250-51; Finding of Fact 13, R. 346-7; R. 2576-8, 1644-5, 1642-3, 496, 545; Finding of Fact 13, R. 347; R. 2593-4.

bonds with its own funds in order to secure success of the project.[1]

After the terminal was completed, the Union Pacific played the principal role in its management, not only operating all of the rail facilities but also handling most of the affairs of the market facilities. Its officials continued in charge of solicitation of tenants[2]—the most important phase of the management of rental properties like the wholesale produce warehouses and the farmers' market. Mr. Fean not only managed the farmers' market but held the keys for wholesale store units in the warehouses[3] in which Mr. DeOreo and Fean assigned tenants to particular space as they moved in.[4] The Union Pacific paid for advertiing the terminal,[5] and enlisted its agents upon a campaign designed to persuade grocers and other buyers of produce to patronize the market at the terminal,[6] and checked and recorded the number of buyers and truckers patronizing the new terminal as well as those patronizing the old market in Missouri.[7] Its officers and agents could truthfully refer, as they did in corresponding with one another, to "our market."[8] Mr. Stanley[9] ejected one produce dealer from the market, in spite of the fact that the dealer was occupying quarters under lease from the City.[9]

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[1] Haugh, R. 1106. Mr. Haugh told the higher Union Pacific officials in New York about the situation resulting from the failure of the investment bankers to purchase the bonds and he says they were, of course, interested because they had made the commitments and "had gotten by that time into this thing pretty deeply, particularly in the development of information."

[2] Burns, R. 450; Zeigler, R. 461; Yukon, R. 601-8; Marshall, R. 712-8.

[3] Fean, R. 585-7; Sheahan, R. 470.

[4] Studna, R. 1265; Gordon, R. 1260-61.

[5] Koerper, R. 686-9; Stanley, R. 1087; Ex. 12, R. 1778, 1783.

[6] Ex. 12, R. 1775, 1783.

[7] Ex. 18, R. 2073-80.

[8] Ex. 18, R. 2077-80.

[9] Yukon, R. 602-8. In notifying the produce dealer, Simon Yukon, that he would have to get out, Mr. Stanley professed to be merely delivering a message from other members of the Merchants' Committee (Yukon, R. 603); but

When important action was required to be taken on matters affecting the market facilities, the City always passed the necessary ordinances or resolutions, but almost invariably under guidance and direction of the Union Pacific. For example, when on June 2, 1937, the Union Pacific determined that the Public Works Administration application should be filed by the City,[1] a copy of the application was submitted to the Board of City Commissioners at an evening session by an architect who said he was in the employ of the railroad,[2] with the statement that it was necessary that the application be approved and sent to Washington that night.[3] Commissioner Darby protested his inability "to cast an intelligent vote on figures of this magnitude which had just been handed to him without time for study," but he contented himself with reserving the right to change his vote.[4] May 26, 1939, Vice-President Haugh advised President Jeffers that "We had previously held up execution by Kansas City, Kansas, of lease which had been signed by jobbers. We are today, however, having them execute and copies delivered to each jobber tenant."[5] December 18, 1939, Mr. Haugh advised Mayor McCombs that the notice for payment of rent on all of the leases excepting those where special

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it could not be that Mr. Stanley was merely a messenger for the Merchants' Committee, a group hired by Mr. DeOreo to assist in the promotion of the terminal, and whose compensation Mr. Stanley said he would see DeOreo paid (Yukon, R. 605).

[1] "I believe it advisable now for the City to proceed with its application to P. W. A."—Haugh to Stanley, June 2, 1937, Ex. 2, R. 1523.

[2] "Commissioner Darby asked Mr. Gentry if he has been employed by the City and Mr. Gentry stated that he has not been employed by the City but that he has been getting up figures and plans for the railroad and would be glad to continue the work."—Official Journal of Kansas City, Kansas, June 24, 1937, Ex. 62-A, R. 2481.

[3] Id., R. 2482.

[4] Id., R. 2483.

[5] R. 1744. Mr. Haugh added, "We are also proceeding immediately to organize jobbers into a Market Assn. on which will be representatives of farmer and broker."

adjustments were to be made should be served.[1] Following this advice, the Board of City Commissioners on December 28, 1939, ordered that the Mayor and City Clerk serve notices on all tenants that the produce buildings would be ready for occupancy on February 1, 1940.[2]

Instances of this kind could be multiplied many fold. The fact, however, that the Union Pacific controlled the actual, if not the formal, actions of the City probably is best illustrated by the attitude of persons intimately associated with the terminal project. When Mr. H. F. Schaible, a Commissioner from the inception of the terminal project to April, 1939, sought employment as manager of the food terminal, he directed his communication to Mr. Stanley of the Union Pacific.[3] Mr. Cravens of Stifel, Nicolaus & Company, in writing to Mr. Stanley about purchase of the revenue bonds, said he predicated his proposal on the fact that "the Union Pacific Railroad Company will be the chief beneficiary under this program."[4] When the investment bankers withdrew their commitment to purchase the bonds, they attempted to secure reimbursement from the Union Pacific for expenses incurred in the deal.[5] When Messrs. DeOreo and Fean sought compensation for services performed as leasing agents they threatened, through their attorney, to sue the Union Pacific.[6] These people on the inside knew who controlled the project, who was the real party in interest.

This is little more than a bare summary of the facts supporting the District Court's findings regarding Union Pacific domination and control, but its sufficiency, especially

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[1] R. 1787.
[2] Ex. 62-A, R. 2524.
[3] R. 1943-4.
[4] Cravens to Stanley, November 3, 1937, Exhibit 13, p. 44, R. 1821.
[5] R. 1881, 1883, 1885.
[6] Finding of Fact 14, R. 348.

when taken in conjunction with the evidence previously reviewed regarding the Union Pacific's major role in soliciting tenants and in offering whatever inducements necessary in order to get them, is scarcely open to question. The whole undertaking was very nearly an exclusively Union Pacific project from beginning to end, with the City, to use the precisely accurate characterization of Vice-President Haugh as merely a front. Indeed, one difficulty from a realistic standpoint about the theory of a joint enterprise is to find sufficient participation by the City to justify according it anything like equal rank with the Union Pacific; but since the City's participation is admitted, and even insisted upon by the appellants, and since equality of participation is not an essential element of the relationship, a joint enterprise may be taken as sufficiently established.

VI.

State Statute and Decision No Defense for Concessions With Respect to Transportation.

The appellants urge that the rentals charged by the City to tenants of the food terminal were fixed in accordance with State law and hence cannot be illegal. The District Court, they complain, erred in refusing to follow and apply the State statute [1] regarding the rentals of the food terminal as construed by the Supreme Court of Kansas.[2]

In so complaining, appellants overlook the fact that the State statutes and the decision of the Supreme Court of Kansas are not legal defense for the granting of rental concessions to shippers in interstate commerce which violate the Federal laws regulating interstate commerce. The Union Pacific and the City are subject to both the laws of

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[1] Chap. 13, Secs. 1238-45, General Statutes of Kansas.

[2] *State ex rel. Parker* v. *Kansas City* (1939), 97 P. (2d) 104; (1940) 98 P. (2d) 101, 151 Kan. 2.

the State and the laws of the United States. Each sovereign is supreme in its field—neither is concerned with the field of the other. The State of Kansas could not give the Union Pacific or the City letters of marque and reprisal to raid interstate commerce or grant them a charter to violate the Interstate Commerce Act and the Elkins Act. Nor did its Legislature or the State Supreme Court attempt to do any such thing. It may be that the Union Pacific and the City have secured immunity from charges of violations of the Kansas law, but this is a question of no concern in the case at bar, which is concerned solely with the laws of the United States enacted under the Commerce Clause of the Federal Constitution.

The argument of appellants rests upon four untenable assumptions: first, that there is a conflict between this State statute and the Federal statutes prohibiting concessions; second, that there is a conflict between the decision of the Supreme Court of Kansas construing the State statute and the decision of the District Court below in construing and applying the Federal statutes; third, that in event of conflict between State and Federal laws regulating interstate commerce, the State laws will prevail; and, fourth, that the decision of the State court is a binding determination of the legality of the acts of the defendants.

But in truth there is no conflict; if there were, the Federal and not the State laws would prevail; and the State decision is not *res judicata* on any question in this case.

1. *No Conflict between State and Federal Statutes.*

There is no conflict between the State and Federal statutes because they are concerned with different objectives, the attainment of neither one of which interferes with the attainment of the other. One is aimed at the prevention of rebates and concessions with respect to interstate railroad transportation; the other is directed to the protection of in-

vestors. Neither objective may be attained without in some way determining or prescribing a minimum standard to be observed in fixing the lowest point to which the rentals may properly go.

Chapter 13, Sections 1238-45, General Statutes of Kansas, 1935, is the authority under which the bonds for the construction of the Food Terminal were issued. Principal and interest on the bonds are required, by Section 1239, to be paid exclusively out of revenues from the project, and in Section 1240 it is specifically provided that the bonds shall not constitute a general obligation of the City. No mortgage is given on the terminal property. Since the only security offered was the net income from the project, it was manifestly necessary, in order to make the bonds salable, to throw strong safeguards around the raising of revenue and the outlay for expenses.

One of the principal safeguards is the provision in Sections 1242 and 1243 of a standard for fixing minimum rentals under which such rentals must be kept sufficiently high to pay operating expenses and interest and to provide for a sinking fund to pay off the bonds at maturity.[1] That

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[1] Sections 1242 and 1243 of the statute read as follows:

"13-1242. *Payment; rates and charges; sinking fund.* Provision shall be made by the governing body of such city for the payment of said bonds, by fixing rates and charges for the use of and the services to be rendered by such property and facilities, which rates and charges so fixed shall be sufficient to pay all expenses of the city in connection therewith and cover the cost of operation and repairs, pay all interest charges upon all indebtedness created for the purpose of improving, constructing, reconstructing, repairing or improving of such public levee and the improvements and facilities thereon for which such revenue bonds were issued to so improve, construct, reconstruct or repair and to provide a sinking fund sufficient to pay off such indebtedness at maturity. (L. 1933, ch. 43, Sec. 5 (Special Session); Nov. 21.)

"13-1243. *Contracts for construction of improvements.* The governing body of such city, is hereby empowered and authorized to enter into an agreement in writing with any person, firm or corporation to erect and construct on its public levee, improvements and facilities authorized and mentioned in this act and lease the same for a term of not to exceed ninety-nine years for such rental and upon such conditions as in the judgment of said governing body

the purpose of this provision is the protection of the bondholders is clearly indicated by the opening clause of Section 1242, reading: "Provision shall be made by the governing body of such city for the payment of said bonds, by fixing rates and charges for the use of and the services to be rendered by such property and facilities * * *" It is further indicated by the authority given to the City in Section 1240, permitting it to "create a lien on the revenues to be obtained from such property and facilities and pledge the same to the payment of said revenue bonds and interest thereon."

It is not the intention of the statute to regulate the rental rates in the interest of the public or to exercise any other branch of the police power of the State. It is merely to promote the salability of the bonds by providing a measure of statutory protection for those who may buy them. The requirement is analogous to the safeguards sometimes inserted in the charter or by-laws of a private corporation authorizing the provisions in a mortgage indenture for the protection of holders of its income bonds.

As recognized in *State ex rel. Parker* v. *Kansas City*,[1] which appellants rely upon as settling the proper construction of this State statute, the City's powers are proprietary—not regulatory.[2] Aside from its duty to protect the

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will be to the best interest of such city, provided the rent fixed by any such agreement and lease shall be sufficient to liquidate and pay all expenses of the city connected therewith and the principal and interest of all revenue bonds issued or to be issued to pay the full cost of such improvements and facilities so leased. (L. 1933, ch. 43, Sec. 6 (Special Session); Nov. 21.)"

[1] (1939), 97 P. (2d) 104; (1940) 98 P. (2d) 101, 151 Kan. 2.

[2] The City, in its resolution requesting the Attorney General to bring the *quo warranto* proceedings, asked that it be brought "to determine whether or not the City and its Commissioners, in its proprietary capacity, have authority to pay such sums as are necessary in the discretion and sound judgment of the Board of City Commissioners to carry out, in the discretion of said Board, such policies and transactions as may be to the best interest of said City in securing tenants for said Kansas City Food Terminal." (R. 2655) (*State ex rel.*

bondholders, the City, in the management of this proprietary enterprise may, so far as the State statute is concerned, charge such rent as it may see fit with substantially the same freedom of action as if it were an ordinary business corporation. Once the bonds are retired, the minimum rentals —again so far as the State statute is controlling—need only be high enough to defray operating expenses, but when and if this time arrives there is nothing to prevent the City from charging the same or higher rentals.[1]

If the Federal government, in the exercise of its power to prohibit concessions with respect to railroad transportation in interstate commerce prescribes a standard resulting in a lower minimum than that required by the State statute for the protection of investors in the enterprise, there is no conflict but merely a situation where there are two minima which must be observed, one for one purpose and another for another purpose, with the higher minimum not only governing in practical effect but also serving to satisfy the requirements of the lower minimum. Con-

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Parker v. *Kansas City*, *supra*, pp. 102-3) In deciding the case the Court upheld the action as within the proprietary powers of the City, saying at page 106:

"This court has frequently recognized that there are two distinct phases of corporate capacity vested in the cities of this state,—their strictly governmental capacity in which they are to be concerned with the health, safety and morals of the public as direct agencies of the state, and their quasi-private or proprietary capacity in which their corporate concerns are left largely to the city's own determination. Familiar instances of the latter are the adventures of a city into municipal ownership of public utilities, such as water, gas and electric power plants. In the exercise of their proprietary prerogatives this court has said that the governing officials of a city may lawfully exercise their discretion and judgment in much the same way as is done by the directors of a private corporation or by the proprietor of a private business."

[1] The Court expressly so declared in *State ex rel. Parker* v. *Kansas City*, *supra*, saying at page 105:

"The rates and charges may be higher than this requisite minimum. Certainly the statute does not contemplate that when the bonded debt is liquidated the rates and charges must be reduced accordingly. The broad statutory mandate will continue to govern,—the governing body will continue to exercise its discretion as to what 'will be to the best interest of (the) city.'"

versely, if the minimum demanded by Federal authorities is the higher there is likewise, for the same reason, no conflict. There is thus no conflict between these two statutes, one State and the other Federal.

2. No Conflict Between State and Federal Decisions.

There is not only no conflict between the two statutes but no conflict between the decisions under them. The Court below held that the various concessions offered or given by the City to the shippers were with respect to transportation and, therefore, violative of the Federal statutes against rebating. In what manner is this in conflict with the decision of the Supreme Court of Kansas in *State, ex rel. Parker* v. *Kansas City,*[1] holding, on the basis of the meager facts presented to it in a friendly suit that the same concessions are not violative of the State statute? This proceeding in *quo warranto* was brought at the request of the City by the Attorney General of Kansas to test the question whether the City has the power under the State statute to make the concessions. Two questions were raised by the pleadings: (1) Whether Kansas City, Kansas, has the charter or corporate power under the applicable State statutes to pay concessions to prospective tenants of the market; and (2) whether the proposed cash payments could be made without violating the lien of the Union Pacific as bondholder on all moneys in the public levee fund not required for the payment of the ordinary operating expenses.[2]

The Supreme Court of Kansas in deciding the case on the pleadings ignored the second question without comment but apparently only because it was not deemed cognizable in *quo warranto,*[3] and because the Union Pacific in open

[1] (1939), 97 P. (2d) 104; (1940) 98 P. (2d) 101, 151 Kan. 2.

[2] R. 61-3.

[3] *Johnson* v. *Manhattan Ry. Co.* (1933), 289 U. S. 479; *State ex inf. Crow* v. *Atchison, Topeka and Santa Fe Railway Co.* (1903), 176 Mo. 687; *Jansky* v. *Baldwin* (1926), 120 Kan. 728.

court waived its lien by urging that payment of the concessions be permitted.[1] Only the first question was decided, the court holding that the City would not transcend its statutory powers by giving special inducements to prospective tenants,[2] and that determination has never been disputed in the case at bar. No attempt was even remotely made by any party to raise before the Supreme Court of Kansas any issue involving the violation of any law, statutory or otherwise, State or Federal, against giving rebates

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[1] Finding of Fact 25, R. 275-6; Conclusion of Law 12, R. 284-5.

[2] The lower court so held. Conclusion of Law 13, R. 371-2. The correctness of this view is clearly evident from an examination of the opinions of the Supreme Court of Kansas. Two opinions were handed down: the first a short memorandum opinion on Dec. 22, 1939, 151 Kan. 1, 97 P. (2d) 104, and the second a formal opinion on Jan. 27, 1940, 151 Kan. 2, 98 P. (2d) 101.

In the memorandum opinion the Court said that the action was brought to test the validity of a resolution of the City authorising the giving of cash bonuses and rental credits to produce dealers to induce them to become tenants of the new food terminal, and then quoted the resolution passed by the City asking the Attorney General to institute suit to determine whether the City and its officials, acting in a proprietary capacity "have authority to pay such sums." The Court expressly stated that it confined its decision to the narrow question presented by the Attorney General, saying at page 104:

"The argument, particularly on the behalf of the city, took a wider range than that involved in the precise issue tendered by the attorney general, and the court makes no ruling except on the precise question briefly stated above.

"On that issue the court renders judgment in favor of the defendant city and its officials."

In the formal opinion the Court expressly stated that the issue was to be determined solely with reference to the powers granted to the City by the statute, saying at page 104:

"However in the case at bar it seems rather clear that the proper conclusion to be reached does not turn on a critical examination of analogous cases, but rather upon a study of the pertinent statute and the pertinent circumstances under which the defendants assume to act."

And again, at page 105 the Court said:

"Note that the statute says the governing body of the city may lease the market facilities upon such terms and conditions 'as in the judgment of said governing body will be to the best interest of such city.' Under such a broad grant of statutory power, it would appear that what the city and its governing officials undertake to do would have to transcend all reasonable bounds of official discretion."

or concessions with respect to transportation, and no such question was decided.

A holding that certain acts are within the corporate power of a city or of a private corporation is not equivalent to a decision that they are in conformity with all laws, State and Federal, or that they may be performed irrespective of the provisions of any such laws. A determination that the City may, conformably to its charter powers, give one produce firm $30,500 in cash to induce it to move to the food terminal, or to allow another dealer free rent for six months for the same purpose, is scarcely to be deemed a holding that such rebates or concessions may be given with respect to transportation by railroad in interstate commerce irrespective of the prohibition contained in the applicable Federal statutes. The fact is that there is no inconsistency between the decision of the Supreme Court of Kansas in the *quo warranto* case and the decision of the District Court below in the case at bar, because they were dealing with distinctly different issues—one with the question of corporate power and the other with the proper construction and application of the Federal statutes against rebating.

3. *Even If There Were Conflict, the Federal Law Must Prevail.*

While there is no conflict between the State and Federal statutes, or in the decisions under them, the appellants could not prevail even if there were. The Constitution and laws of the United States are the supreme law of the land and furnish the binding rule of decision, "any thing in the constitution or laws of any state to the contrary notwithstanding."[1] The power to regulate commerce among the several states is supreme and plenary, complete in itself,

[1] Article VI, Clause 2, Federal Constitution.

may be exercised to its utmost extent, and acknowledges no limits other than are prescribed in the Constitution.[1] Its purpose was to insure uniformity of Federal regulation against conflicting and discriminating State legislation.[2]

A statute enacted by Congress under the commerce clause is paramount, and any State regulation, statute or decision must yield in the event of conflict.[3] State statutes or regulations in conflict with provisions of the Interstate Commerce Act have repeatedly been held invalid by this Court,[4] and in some of these instances the conflict was with some of the provisions of the latter Act that are involved in this case, including the ban on discrimination,[5] and the

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[1] *The Minnesota Rate Cases* (1913), 230 U. S. 352, 398; *Gibbons* v. *Ogden* (1824), 9 Wheat. 1, 196; *Commission* v. *Texas & N. O. R. Co.* (1931), 284 U. S. 125.

[2] *The Minnesota Rate Cases* (1913), 230 U. S. 352; *Brown* v. *Maryland* (1827), 12 Wheat. 419.

[3] *Gibbons* v. *Ogden* (1824), 9 Wheat. 1, 210-211.
The Minnesota Rate Cases (1913), 230 U. S. 352, 399-400.

[4] *Texas* v. *United States* (1934), 292 U. S. 522, 531, 535; *Louisiana Public Service Commission* v. *Texas & N. O. R. Co.* (1931), 284 U. S. 125, 130-31; *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy Ry. Co.* (1922), 257 U. S. 563, 589-590; *New York* v. *United States* (1922), 257 U. S. 591, 600-1; *Houston, East and West Texas Ry.* v. *United States* (1914), 234 U. S. 342; *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Edwards* (1913), 227 U. S. 265, 268-9; *Chicago, Rock Island & Pacific Ry. Co.* v. *Hardwick Farmers Elevator Company* (1913), 226 U. S. 426; *Gulf, Colorado, etc. Railway* v. *Hefley* (1895), 158 U. S. 98.

[5] *Houston, East and West Texas Ry.* v. *United States, supra.* In this case Mr. Justice Hughes, in holding invalid a State regulation found to discriminate against shippers of goods in interstate commerce, said at pages 350-1:

"First. It is unnecessary to repeat what has frequently been said by this court with respect to the complete and paramount character of the power confided to Congress to regulate commerce among the several States. It is of the essence of this power that, where it exists, it dominates. Interstate trade was not left to be destroyed or impeded by the rivalries of local governments. The purpose was to make impossible the recurrence of the evils which had overwhelmed the Confederation and to provide the necessary basis of national unity by insuring 'uniformity of regulation against conflicting and discriminating state legislation.' By virtue of the comprehensive terms of the grant the authority of Congress is at all times adequate to meet the varying exigencies that arise

ban on departures from the strict observance of railroad tariffs.[1] In *Chicago, Indianapolis and Louisville Railway Company* v. *United States*,[2] it was held that the Elkins Act is paramount in matters affecting interstate commerce and any conflicting State statute must give way. The railroad company there had made a contract for delivery of transportation in exchange for advertising. It contended that the contract was authorized by the Indiana statute from which it derived its corporate powers and which, in express words, authorized the company to issue transportation in payment for printing and advertising. The court held that this State statute was unavailing since the Elkins Act, as a Federal statute regulating interstate commerce, is paramount and prohibits a carrier from accepting any compensation other than cash for interstate transportation.[3]

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and to protect the national interest by securing the freedom of interstate commercial intercourse from local control." * * *

and again at page 354:

"The use of the instrument of interstate commerce in a discriminatory manner so as to inflict injury upon that commerce, or some part thereof, furnishes abundant ground for Federal intervention. Nor can the attempted exercise of state authority alter the matter, where Congress has acted, for a State may not authorize the carrier to do that which Congress is entitled to forbid and has forbidden."

[1] *Gulf, Colorado, etc. Railway* v. *Hefley*, (1905), 158 U. S. 98. There the Court said at pages 102-3:

"Clearly the state and the national acts relate to the same subject-matter and prescribe different rules. * * * In case of such a conflict the state law must yield. 'This Constitution, and the laws of the United States which shall be made in pursuance thereof * * * shall be the supreme law of the land.' U. S. Constitution, Art. VI, clause 2. * * * The question is not whether, in any particular case, operation may be given to both statutes, but whether their enforcement may expose a party to a conflict of duties. It is enough that the two statutes operating upon the same subject-matter prescribe different rules. In such case one must yield, and that one is the state law."

[2] (1911), 219 U. S. 486.

[3] The Court said at page 497:

"2. We need say but little about the Indiana statute upon which the defense is in part based. The transactions, in respect of which the Government seeks relief, being interstate in their character, the acts of Congress as to such

Accordingly, in so far as the Kansas statute or decision may conflict with the prohibition of rebates with respect to interstate transportation by railroad, contained in the Interstate Commerce and Elkins Acts, it is without force or effect.

4. *Supremacy of Federal Laws Not Affected by City's Part in Ownership and Operation of Terminal.*

The supremacy of the Federal law in the event of conflict is not diminished or in any way affected either by the circumstance that in offering or giving the concessions the City purported to act in an official capacity or by the circumstance that in so doing it was dealing with a terminal which is in part at least municipally owned.

In participating in the promotion and operation of the food terminal the City is admittedly engaged in a proprietary undertaking. It is not carrying on a function essential to the existence of the City government but a business ordinarily left to private enterprise. Such an enterprise, whether State owned or municipally owned, enjoys no immunity from Federal laws. A State owned liquor dispensary,[1] the officers of a municipally operated street railway[2] and the officers of a bi-State port authority engaged in the construction and operation of bridges, tunnels and a freight

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transactions are paramount. No state enactment can be of any avail when the subject of such transactions has been covered by an act of Congress acting within the limits of its constitutional powers. It has long been settled that when an 'act of the legislature of a State prescribes a regulation of the subject repugnant to and inconsistent with the regulation of Congress, the state law must give way, and this without regard to the source of power whence the state legislature derived its enactment.' *Sinnot* v. *Davenport*, 22 How. 227, 243; *M. K. & T. Railway* v. *Haber*, 169 U. S. 613, 626; *Reid* v. *Colorado*, 187 U. S. 137. This results, Chief Justice Marshall said in *Gibbons* v. *Ogden*, 9 Wheat. 1, as well from the nature of the Government as from the words of the Constitution."

[1] *South Carolina* v. *United States* (1905), 199 U. S. 437; *Ohio* v. *Helvering* (1934), 292 U. S. 360.

[2] *Helvering* v. *Powers* (1934), 293 U. S. 214.

terminal [1] are all subject to Federal taxation, because the activities in which they are engaged represent an enlargement of the traditionally governmental functions of a State, the taxation of which does not interfere with functions essential to the maintenance of State government.[2] The strictly governmental activities essential to the maintenance of State government alone enjoy exemption from Federal taxation.[3]

But while there is a recognized limitation on the Federal power of taxation there is none on the plenary power to regulate commerce. This Court specifically so held in deciding that a State-owned railroad is subject to the Interstate Commerce Act and may be required to pay a penalty for violation of its safety provisions.[4] The exercise of the power of a sovereign state in the ownership or operation of a railroad terminal is thus subordinate to the exercise of

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[1] *Helvering* v. *Gerhardt* (1938), 304 U. S. 405.

[2] This is the test applied in the later cases such as *Helvering* v. *Gerhardt*, *supra*, and *United States* v. *California* (1936) 297 U. S. 175, 183-5. The old test was whether the business was carried on in the exercise of a governmental or of a proprietary function. *South Carolina* v. *United States*, *supra*.

[3] *Helvering* v. *Gerhardt*, *supra*, pp. 414-20.

[4] *United States* v. *California* (1936), 297 U. S. 175. The Court said at page 185:

"Hence we look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. But there is no such limitation upon the plenary power to regulate commerce. The state can no more deny the power if its exercise has been authorized by Congress than can an individual.

"California, by engaging in interstate commerce by rail, has subjected itself to the commerce power, and is liable for a violation of the Safety Appliance Act, as are other carriers, unless the statute is to be deemed inapplicable to state-owned railroads because it does not specifically mention them. * * * The danger to be apprehended is as great and commerce may be equally impeded whether the defective appliance is used on a railroad which is state-owned or privately-owned. No convincing reason is advanced why interstate commerce and persons and property concerned in it should not receive the protection of the act whenever a state, as well as a privately-owned carrier, brings itself within the sweep of the statute, or why its all-embracing language should not be deemed to afford that protection."

the Federal regulatory power.[1] Neither the City nor its officers can enjoy any immunity which the State itself does not possess. They are as much subject to the Federal statutes prohibiting concessions with respect to railroad transportation as any other person.

5. *Construction of these Federal statutes presents Federal questions.*

The proper construction and application of these statutes condemning rebates present Federal and not State questions. The decision of the Supreme Court of Kansas in *State ex rel. Parker* v. *Kansas City*,[2] interpreting the Kansas statute, is of no effect in determining whether rebates and concessions are unlawful under the Federal statutes.

The rule of *Erie R. Co.* v. *Tompkins*[3] that the Federal courts, in determining questions of general law, must follow the State law is not in point because the questions here are not of general law but of the proper construction and application of Federal statutes. This Court held that the result in the *Erie* case was required by the positive commands of the Federal Judiciary Act of 1789.[4] That act by its terms specifically excepts from the requirement of following the laws of the several States any case which turns on the Constitution or statutes of the United States.[5] Since

[1] *United States* v. *California* (1936), 297 U. S. 175; *Tilden* v. *United States* (1927), 21 F. (2d) 967; *McCallum* v. *United States* (1924), 298 Fed. 373; *Texas State Railroad* (1930), 34 I. C. C. Val. Rep. 276; *United States* v. *Belt Line R. Co.* (1919), 56 I. C. C. 121; *California Canneries Company* v. *Southern Pacific Co.* (1918), 51 I. C. C. 500, 502-3.

[2] (1939), 97 P. (2d) 104; (1940) 98 P. (2d) 101, 151 Kan. 2.

[3] (1938), 304 U. S. 64.

[4] 28 U. S. C. 725. This provision reads:

"The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

[5] *Henkel* v. *Chicago, etc., Ry.* (1932), 284 U. S. 444; *Virginia Coupon Cases* (1885), 114 U. S. 270, 5 S. Ct. 903, 29 L. Ed. 185; *Connecticut Mutual Life*

the *Erie* case was decided both this Court and the lower Federal courts have refused to apply State law in the construction and application of Federal statutes.[1]

6. *State Court Decision Regarding City's Charter Powers Not Res Judicata on any Issue Involved Here.*

The judgment in *State ex rel. Parker* v. *Kansas City*[2] is not *res judicata* on any issue in the case at bar because here the cause of action, the parties and the issue are different.

First: The *quo warranto* proceeding before the *State* court was brought to oust the City from the exercise of powers allegedly beyond those conferred by law. The complaint in the case here asks for an injunction against acts—some of them the same as and others different from the acts involved in the prior proceeding—in violation of the Fed-

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Ins. Co. v. *Schaefer* (1877), 94 U. S. 457, 24 L. Ed. 251; *Mo. Kans. & Tex. Ry.* v. *Harriman* (1913), 227 U. S. 657, 672.

[1] *Lyeth v. Hoey* (1938), 305 U. S. 188; *United States* v. *American Surety Co.* (June 7, 1938), 23 Fed. Supp. 644, 645; *Downey* v. *City of Yonkers* (June 13, 1938), 23 Fed. Supp. 1018, 1023; *McCarty* v. *Gault* (Oct. 3, 1938), 24 Fed. Supp. 977, 979; *Bradford* v. *Chase Nat'l Bank* (1938), 24 Fed. Supp. 28, 30; *Hollingsworth* v. *General Petroleum Corporation* (1939), 26 Fed. Supp. 917; Annotation—State Decisions in Federal Courts, 83 U. S. L. Ed. 519, 520-1.

In *Lyeth* v. *Hoey, supra,* this Court said at page 194:

"In dealing with the meaning and application of an act of Congress enacted in the exercise of its plenary power under the Constitution to tax income and to grant exemptions from that tax, it is the will of Congress which controls, and the expression of its will, in the absence of language evidencing a different purpose, should be interpreted 'so as to give a uniform application to a nationwide scheme of taxation.' Burnet v. Harmel, 287 U. S. 103, 110. Congress establishes its own criteria and the state law may control only when the federal taxing act by express language or necessary implication makes its operation dependent upon state law."

The Interstate Commerce Act and the Elkins Act are part of a nationwide scheme for the regulation of interstate transportation by railroad, and uniformity of application of the ban on discriminations and departures from published tariffs was one of the main purposes of Congress. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.* (1907), 204 U. S. 426, 439.

[2] (1939) 97 Pac. (2d) 104, 151 Kan. 2, 98 P. (2d) 101.

eral statutes against rebating, and is plainly a different cause of action.

Second: The parties are not the same. None of the appellees—neither the United States nor any of the other appellees—was a party to the *quo warranto* case or in privity with any one who was. This is fatal to the existence of estoppel by judgment. A stranger to the record is not concluded by a judgment.[1]

The Government in bringing action under the Elkins Act is not concluded or even affected by a judgment in a prior suit between the defendant and a third party over the same subject matter.[2] The law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a *quo warranto* proceeding to which he is a stranger.[3]

Third: The issues in the two cases are different as has already been shown. Since in a subsequent suit on a different cause of action the only questions ever conclusively

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[1] *Bigelow* v. *Old Dominion Copper Co.* (1912), 225 U. S. 111, 126; *United States* v. *Southern Pacific Co.* (1922), 259 U. S. 214, 240.

[2] *United States* v. *Satuloff Bros.* (C. C. A., 2d, 1935), 79 F. (2d) 846, 848-9. In that case Satuloff Bros. Inc. filed a claim with a railroad based on a shortage in a carload of turkeys. The railroad company denied the claim contending that the missing turkeys were secretly removed from the car by the Secretary-Treasurer of the Company. The Company brought suit in a state court and recovered judgment. Later the Company and its Secretary-Treasurer were indicted under the Elkins Act for soliciting rebates and concessions in filing the claim for shortage. The Court held that the judgment in the civil case was not binding or admissible in evidence on the issue of the falsity of the claim.

[3] *Chase National Bank* v. *City of Norwalk* (1934), 291 U. S. 431. In this case the Court held that a mortgage trustee was not bound by a judgment of ouster against the mortgagor, an electric utility, in an action in *quo warranto* previously brought by the State. The Court said at page 441:

"The law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger. Whether under the Ohio practice it would have been possible for the trustee to intervene, we have no occasion to determine. Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights."

settled are those actually raised and determined in the prior proceeding, none of the issues in the present case are *res judicata* by reason of the decision of the Supreme Court of Kansas.[1]

The principle of *res judicata* is applicable only to the point adjudged and not to matters only collaterally under consideration,[2] and this rule applies with greater force where a Federal question is unnecessarily raised and determined in an action under a state statute.[3]

It can not be overlooked that no genuine controversy was presented in the *quo warranto* proceedings. They were instituted by the Attorney General at the request of the City, which was acting in close cooperation with the Union Pacific. Both the petition and the answer were drafted by the same group of lawyers, some of whom were attorneys for the Union Pacific and some of whom were attorneys for the City.[4] The Union Pacific attorneys took a leading part in the drafting,[5] and one of them participated in the argu-

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[1] *Texas* v. *United States* (1934), 292 U. S. 522, 535; *United Shoe Machinery Corporation* v. *United States* (1922), 258 U. S. 451; 460; *Vicksburg* v. *Hanson* (1913), 231 U. S. 259, 268-9; *Cromwell* v. *County of Sac* (1876), 94 U. S. 351, 352-3; *United States* v. *Southern Pacific Co.* (1922), 259 U. S. 214, 240.

[2] *North Carolina R. R. Co.* v. *Storey* (1925), 268 U. S. 288; *Norton* v. *Larney* (1925), 266 U. S. 511, 517.

[3] *St. Louis Southwestern Ry. Co.* v. *Missouri Pacific Ry. Co.* (1933), 289 U. S. 76.

[4] Ex. 12, p. 33, R. 1787.

[5] City Attorney Skinner admitted that the petition filed with the Supreme Court is "very similar to the draft of petition prepared by Union Pacific attorneys." (R. 3305) Mr. J. L. Haugh, Vice President of the Union Pacific sent a telegram, December 18, 1939, to Mr. W. M. Jeffers, President, saying in part: "Attorneys for City and our attorneys are all at Topeka working on *quo warranto* case. Schedule is to file petition of Attorney General and answer of the City tomorrow morning. Court will hear arguments at 2 o'clock tomorrow afternoon. Decision will be given sometime after that, probably Wednesday. Followed by written opinion of the Court. * * *" (Ex. 12, p. 33, R. 1787.) The result shows that Mr. Haugh was well informed. Although there was a little deviation, his time-table worked out with substantial accuracy. The Attorney General filed the petition Monday, December 18;

ment before the court stating that the Union Pacific as bondholder desired to see the City make the concessions.[1]

The Union Pacific and the City were thus on both sides of the case and they had the opportunity to confine their presentation to those points of fact and of law they desired to bring to the attention of the court. They chose to present nothing necessarily raising any question concerning the violation of any law, State or Federal, against rebating with respect to transportation. Quite possibly their choice was influenced by the thought that any such issues would not be properly cognizable in a *quo warranto* proceeding; but whatever the reason the course followed prevents the resulting decision from having any effect on the excluded issues. It would be a travesty on justice to hold that the Government or the other appellees are in any way estopped by a decision obtained under these circumstances.

VII.

Assertions of Appellants Respecting "Undisputed Evidence"

Throughout their brief, appellants make various assertions which, they say, are supported by "undisputed evidence." Detailed analysis of the instances in which appellants have incorrectly based their assertions upon what they are pleased to regard as "undisputed evidence" is unnecessary. For purpose of illustration, however, appellees respectfully invite the attention of this Court to the following matters wherein appellants have unjustifiably and unwarrantably challenged the conclusions of the court below

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the City answered Tuesday, December 19; argument was had on the same day, December 19; and a *per curiam* decision was delivered Thursday, December 21 (R. 3150-1; 151 Kan. 1; 97 Pac. (2d) 104-5). This was followed on January 27, 1940, by a formal written opinion. (151 Kan. 2; 98 Pac. (2d) 101.)

[1] Hurd, R. 664.

upon the theory of disregard by the court of "undisputed evidence:"

Control by Union Pacific. In their brief (pp. 206, 216-217), appellants assert that the undisputed evidence shows that throughout the whole course of the transactions embraced in the Findings of Fact, the City had and exercised complete control of every phase of the development of its public market and was in no manner subject to the control of the Union Pacific. This represents a palpable effort by appellants to build up a theory of "control" to refute the overwhelming evidence that the Union Pacific influenced and dictated the actions of the City in the establishment of the Food Terminal. Formal action was, of course, taken in most matters by the City. It was the "front."[1] But the Union Pacific invariably planned and directed the steps actually taken by the City. It controlled the actual, if not the formal or technical, actions of the City. (pp. 148-158, *supra.*)

Payment of concessions by Union Pacific. Appellants state that the undisputed evidence discloses that no payments were made or offered by the Union Pacific to any prospective tenant of the market (pp. 190-191, 227, 229). Neither the Union Pacific nor the City made any payments of cash bonuses to prospective tenants. Timely issuance of the restraining order prevented such payments by either of them.[2] And appellees do not contend that the Union Pacific proposed to make payments to prospective tenants directly out of its own treasury. The payments were proposed to be made from revenues upon which the Union Pacific had first claim, and the entire financial burden of the enterprise for an indeterminate period in the future rests upon the Union Pacific. (pp. 41-60, *supra.*)

Proposed adjustments in excess of loss and damage sustained. Appellants state at pages 162 and 163 of their

[1] Ex. 4, R. 1565.
[2] R. 819, 906.

brief that there is no evidence that the City intended at any time to pay any tenant more than the amount required to reimburse him for actual loss and expense sustained. This is entirely fallacious. The record discloses quite the contrary. While cash payments and rental credits ostensibly were to have been allowed prospective tenants for certain costs due to rental obligations on their former places of business and costs resulting from abandonment of equipment and facilities, the record shows that in many instances such payments and credits would have had little relation to the costs which would have been incurred. (pp. 61-64, *supra.*)

For example, no physical inspection of the properties involved appears to have been made by any official of Kansas City, Kansas.[1] Mallin Produce Company was offered $20,000 rather than $15,000 when it agreed to lease two units instead of one;[2] Joseph Cherrito was offered $1,400—an amount admittedly in excess of the cost of his equipment;[3] the adjustment in the case of Garrett Holmes & Company rested upon a fictitious statement built up by Mr. Stanley to conceal the fact that the firm was being in effect given approximately three years' free rent at the new terminal on five wholesale warehouse units;[4] Sam Litman was to have been paid on the basis of a lease obligation in Kansas City, Missouri, for a period of six years when such lease actually expired February 29, 1940;[5] Harry Robinson would have been paid $600 to cover the unexpired portion of a six-months' lease whereas he was actually occupying premises in Kansas City, Missouri, on a month-to-month basis;[6] and Winick Brothers were to have been

[1] R. 918.
[2] R. 449-451.
[3] R. 455-456.
[4] Sheahan, R. 466-9; Ex. 27, p. 10, R. 2173, 2179. Mr. Stanley admitted he prepared Ex. 27; Stanley, R. 1079.
[5] R. 551-552, 722, 2674-2675.
[6] R. 567, 710.

paid $12,000 for property which actually cost them less than $1,000.[1]

The special investigating committee appointed by the City on November 16, 1939, regarded the demands of the produce dealers as exorbitant. Mr. Howard Payne, City Clerk, stated that "The committee was so sort of flabbergasted by the amounts that they were talking about that they didn't tell them much of anything,"[2] and "it looked to me like they wanted us to buy the market out again, the kind of money they were talking about."[3]

Guaranty offered bankers by Union Pacific. Appellants state at pages 220 to 221 of their brief that the evidence is undisputed that negotiations between the bankers and the Union Pacific continued many months in an effort to induce the Union Pacific to guarantee the interest upon, or obligate itself for, rental sufficient to produce the annual interest requirement, and that the Union Pacific consistently refused to make such a guaranty or to extend its rental obligation beyond the maximum rate of rental prescribed by the City for the lease of its improved levee property. Since the Union Pacific finally purchased the bonds for its own account after refusing to provide the guaranty required by the bankers to render them salable to private investors, the nature and extent of the guaranty previously offered by the Union Pacific is not particularly important. However, in the interest of clarification, it should be pointed out that the Union Pacific offered a rental guaranty of $40,000 per annum through the payment of annual rental on the Public Levee land leased for the purpose of constructing the team track yard in excess of the actual rental value of the land. In the course of negotiations between the Union Pacific and Stifel, Nicolaus & Company,

[1] R. 610-611.
[2] R. 680.
[3] R. 679-80.

the rental which was to be guaranteed by the Union Pacific varied between $22,000 and $53,000 per year.[1] However, these figures were tentative only; $40,000 was the rental guaranty definitely offered by the Union Pacific. March 24, 1938, Mr. Haugh advised Mr. Stanley that the City should be able to sell the Revenue Bonds satisfactorily if the Union Pacific agreed to pay a maximum rental of $40,000.[2] May 14, 1938, Mr. Jeffers recommended that lease be authorized providing for maximum rental of $40,000 per year, although recognizing that the actual rental based upon the value of the property should not exceed $10,760 per annum.[3] May 26, 1938, the Executive Committee of the Union Pacific approved the proposition,[4] and July 12, 1938, Mr. Haugh prepared a letter for Mayor McCombs' signature which was delivered to Stifel, Nicolaus & Company, in which the financial set-up of the entire project was contained as a basis for preparing prospectus for sale of the bonds. In Mayor McCombs' letters it is indicated that the Union Pacific would pay a rental guaranty of $40,000 per annum.[5]

Withdrawal of commitment by bankers. The lower court declared that the Union Pacific, "failing to secure a purchaser, bought said bonds itself."[6] Appellants state that this finding ignores undisputed evidence to the effect that that Union Pacific's purchase of the bonds was prompted by the sudden withdrawal of the investment bankers' commitment, which, according to witness Thoron, Director of the Finance Division of the Public Works Administration, was unjustified and supported only by conflicting statements (p. 221). True, indeed, Mr. Thoron regarded the withdrawal of the bankers' commitment as unjustified.[7]

[1] R. 488.
[2] R. 1583.
[3] R. 2187-2189.
[4] R. 2189-2190, 2216.
[5] R. 1603-1604, 2732.
[6] Finding 12, R. 344-345.
[7] R. 1193.

But what Mr. Thoron did not know was that the withdrawal was necessitated by failure of the Union Pacific to furnish the guaranty previously promised to make the bonds salable to private investors and because Mr. Clark, General Counsel for the Union Pacific, considered that the furnishing of such a guaranty without the approval of the Interstate Commerce Commission would constitute a violation of law. In letter addressed Mr. Jeffers on November 9, 1938, Mr. Haugh, in reporting conference with officials of the Public Works Administration, stated:

> "Because of our proposed purchase I did not need to tell them that our General Counsel, Mr. Clark, ruled that he felt we were on dangerous ground by agreeing to such a maximum without approval of the I.C.C."[1]

The General Solicitor and another attorney for the Union Pacific had previously reviewed the proposed rental guaranty and advised Mr. Jeffers that "approval will not be required of the Interstate Commerce Commission."[2] However, they evidently were overruled by the General Counsel, as stated in Mr. Haugh's letter. Moreover, Mr. R. B. Cravens, Assistant Vice President of Stifel, Nicolaus & Company, testified that he had been informed that rental guaranty by the Union Pacific would require the approval of the Interstate Commerce Commission and that the conditions of the P. W. A. grant would not permit the time for making such an application.[3]

October 31, 1938 was a highly significant day in so far as the sale and disposition of the bonds is concerned. On that day, Mr. Charske, Chairman of the Executive Committee, wired Mr. Jeffers recommending the purchase of the bonds by the Union Pacific rather than making payment

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[1] R. 1661.
[2] R. 2188.
[3] R. 496.

of a maximum rental for the land on which the team track yard was to be located.[1] On the same day, Mr. Jeffers replied, recommending purchase of the bonds by the Union Pacific.[2] On the same day, Mr. Stanley telephoned Mr. Stifel and requested assurance of the willingness of Stifel, Nicolaus & Company to release Kansas City, Kansas, from its obligations in connection with the proposed issue;[3] and on the same day Mr. Stifel addressed a letter to Mr. Stanley stating, "We hasten to assure you that immediately upon advices from you, or any other official of the Union Pacific Railroad Company, that the bond issue as now set up can be placed, any and all necessary formal release will be promptly forthcoming."[4]

The withdrawal by the investment bankers may have appeared rather sudden to Mr. Thoron. It certainly came as no surprise to the Union Pacific. In view of the above-stated circumstances, the assertion of appellants that the undisputed evidence shows that appellants proceeded by entirely lawful methods "to circumvent the efforts of opposing interests, still seeking to prevent the construction and successful operation of a needed public improvement" (p. 221) is absurd to say the least.

Union Pacific purchase of ice from The City Ice & Fuel Company. At page 222 of their brief, appellants state that the undisputed evidence shows that the Union Pacific purchased its own ice requirements and those of the Pacific Fruit Express Company, its subsidiary, from The City Ice & Fuel Company because a "supply of ice from the conveniently located cold storage plant was desirable in the interests of efficiency and economy." Quite to the contrary, the Union Pacific contracted to purchase its ice requirements

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[1] R. 1644-1645.
[2] R. 1644.
[3] R. 1642.
[4] R. 1643.

from The City Ice & Fuel Company at Kansas City, Missouri as an inducement demanded by The City Ice & Fuel Company to lease the cold storage facilities at the Kansas City Food Terminal. The latter demanded ice contracts sufficient to compensate for the loss of revenue which would be suffered in the operation of the cold storage facilities at the Food Terminal.[1]

The City Ice & Fuel Company demanded and received contracts for supplying the ice requirements of the Union Pacific and the Pacific Fruit Express Company at Omaha, Nebraska, and Kansas City, Missouri. August 5, 1938, Mr. Haugh wired Mr. Stanley that Mr. W. J. Sinek, Senior Vice President of The City Ice & Fuel Company, "wants to secure as much ice business from U. P. R. R. as possible from Omaha and KC;"[2] August 10, 1938, Mr. Haugh advised Mr. Jeffers that The City Ice & Fuel Company would lease the cold storage plant for 10 or 15 years "depending upon the length of term of ice contract with the Union Pacific and P. F. E.;"[3] October 15, 1938, Mr. Haugh informed Mr. Stanley that "if they make the lease they will expect an ice contract from the Union Pacific at competitive prices";[4] and December 9, 1938, Mr. Jeffers advised Mr. Charske that the Federal Cold Storage Company was interested in leasing the cold storage facilities—

> "providing it can also furnish the Union Pacific and P. F. E. requirements of ice at Kansas City and can furnish through its affiliate, the Peoples' Ice and Cold Storage Co. at Omaha, the ice required by the railroad companies at the Union Station in Omaha."[5]

Mr. Sinek's insistence that The City Ice & Fuel Company be awarded the ice contracts at Omaha and Kansas City

[1] Ex. 17, R. 2045.
[2] Ex. 6, R. 1609.
[3] Ex. 17, R. 2046.
[4] Ex. 17, R. 2051-2052.
[5] Ex. 17, R. 2053.

as an inducement for leasing the cold storage facilities at the Kansas City Food Terminal was satisfied. December 9, 1938, Mr. Jeffers recommended that the ice contracts at Omaha and Kansas City be awarded the Federal Cold Storage Company;[1] January 24, 1939, the Executive Committee of the Union Pacific authorized the approval of the ice contract at Kansas City,[2] and on April 13, 1939, the Board of Directors of the Pacific Fruit Express Company ratified the execution of such contract.[3] The ice contracts in question were submitted in evidence as Exhibits Nos. 40 and 41.

Obviously, the ice contracts entered into between The City Ice & Fuel Company and the Union Pacific and the Pacific Fruit Express Company at Omaha and Kansas City constituted an inducement to The City Ice & Fuel Company to lease the cold storage facilities. The lease never would have been executed if the contracts had not been awarded The City Ice & Fuel Company. They were part and parcel of the transaction. The following quoted testimony of William J. Sinek, Senior Vice President of The City Ice & Fuel Company serves to confirm rather than to dispute this conclusion:

> "Q. I am not asking for the actual conversation, but I a ı asking if you don't remember the substance of the counter-proposals and suggestions that you made to Mr. Haugh and his associates? Let me ask you, specifically, didn't you suggest to him that your Company would consider taking a lease on these cold storage facilities on certain conditions?
>
> "A. Now, Mr. Haugh in all his conversations with me always mentioned one fact. He said, 'Now never tie these two things together.' He said 'The railroad is one thing, the City is another,' and he said 'We want to always be careful never to mix these two things

[1] Ex. 17, R. 2055, 2212-2214.
[2] Ex. 28, R. 2211-2212; Ex. 29, R. 2219-2220.
[3] Ex. 17, R. 2067-2068.

up,' and he would always qualify that whenever he came to see me and I always said to him, 'I understood that thoroughly, and in my dealings, in my dealings with the City, with the City and their officials, they were smart too.'"[1]

The insistence of Mr. Haugh and the City officials that the lease and the ice contracts should never be jointly considered, and their admonition to Mr. Sinek to that effect, evidences a keen realization on their part that the lease and the ice contracts were, in fact, inseparable and that they must, if possible, guard against that fact being disclosed. Their well-laid plans in this connection were rudely disturbed by the correspondence extracted from the Union Pacific files and the naive declaration of Mr. Sinek above quoted. The fact that the ice contracts were awarded to The City Ice & Fuel Company as an inducement for the lease of the cold storage facilities is further corroborated by the statement of Mr. Haugh to prospective bidders that the ice contracts "would go to the lessee of the cold storage plant,"[2] and by the testimony of Mr. A. Hardgrave, Chairman of the Board of General Bottlers, Incorporated, Chicago, Illinois, who, while negotiating on behalf of the U. S. Cold Storage Company, was offered the ice contract at Kansas City by Mr. Haugh to compensate for losses which would be incurred in the operation of the cold storage facilities at the Kansas City Food Terminal.[3] Appellants state that the Union Pacific rejected the proposal made by one of appellees' witnesses on behalf of United States Cold Storage Company for "sweetening" the lease of the cold storage plant by the payment of from $3.65 to $4.00 per ton for its ice requirements as against its then current price of $3.50. (p. 222). Mr. Hardgrave testified

[1] R. 509-510.
[2] Ex. 5, R. 1602.
[3] R. 538-539.

that Mr. Haugh's offer to give the icing contract to the United Cold Storage Company was made in response to his suggestion that the lessee of the cold storage facilities would suffer a loss from their operation.[1] The negotiations between the Union Pacific and The City Ice & Fuel Company respecting the same icing contract lend considerable credence to Mr. Hardgrave's testimony.

Advances made by Union Pacific. Appellants state that prior to the completion of the market, the Union Pacific advanced to the City approximately $22,000 for its use to defray preliminary expenses incurred in the development of the market, and that the undisputed evidence establishes that these advances were made on the agreement of the City to repay the same out of construction funds, and that repayment has not been made solely because of a change in the regulations of the Public Works Administration, in November of 1938, restricting the use of such funds to expenses incurred subsequent to the grant (p. 224).

The total sums advanced by the Union Pacific and its subsidiary, the Kansas City Industrial Land Company, to cover preliminary expenses in connection with the establishment of the Kansas City Food Terminal amount to $42,999.96,[2] of which only $29,288.50 is regarded even by the Union Pacific itself as recollectible from the City.[3] The Union Pacific advanced funds to Kansas City, Kansas, as early as September, 1937. Nevertheless, no portion thereof has been repaid.[4]

The record discloses considerable difference of opinion as to the method by which the amounts advanced to the City were to be repaid. It was Mr. Jeffer's understanding that the amount advanced for preliminary expenses in con-

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[1] R. 538-539.
[2] Ex. 30, R. 2222, 2316, 2321, 2325.
[3] R. 2233, 2273.
[4] R. 908-912.

nection with the food terminal would be repaid out of proceeds received from the sale of the Revenue Bonds if the project succeeded, but that none of the amount advanced would be repaid if the project failed.[1] However, as late as March 25, 1938, it does not appear that any definite arrangement for repayment of the amount advanced by the Union Pacific had been concluded. At Mr. Haugh's insistence,[2] Mr. Stanley attempted to make some arrangement for repayment of the money, but was unsuccessful. In letter addressed Mr. Haugh on March 25, 1938, Mr. Stanley stated:

> "The same matters were discussed with you over the telephone and you were advised that Mayor McCombs thought it would be embarrassing for him to enter into any arrangement at this stage about reimbursing the Union Pacific. He is not personally adverse to the suggestion but views the matter entirely from a public policy standpoint and the fact that such an arrangement would endanger the whole project."[3]

Mayor McCombs and City Attorney Skinner testified that the budget basis followed by Kansas City, Kansas, did not permit repayment of amounts advanced by the Union Pacific out of general revenues of the City; that it was originally intended to make repayment out of construction funds, but that such practice was banned by the Public Works Administration; and that it is now anticipated that repayment will be made from rentals received from the project.[4] However, several years have elapsed since September, 1937, the date upon which amounts were first advanced in connection with the food terminal, and approximately six years have elapsed since amounts were advanced in connection with the grain elevator project, and

[1] Ex. 4, R. 1569-1570.
[2] Ex. 4, R. 1523.
[3] Ex. 5, R. 1584.
[4] R. 788-789, 908-909.

no provision has yet been made in the budget for repayment of amounts advanced and none of the rentals received by the City has been applied to that purpose.

Kansas City, Kansas, has no record of the amounts advanced. It does not know the amount thereof. The Union Pacific has never submitted any bill.[1] Under the circumstances, it taxes credulity to assume that the City expects to make repayment of the funds advanced, or that the Union Pacific expects repayment of such funds. It is a reasonable supposition that the amounts advanced merely constitute another contribution by the Union Pacific to the cost of the project.

Appellants assert that the undisputed evidence shows that the sums thus loaned to the City had no connection with the proposed adjustment and that neither the funds nor the benefit thereof was received by any shipper (p. 224). Similarly, they state that the monthly payments of $350 each to Fean and DeOreo by The Kansas City Industrial Land Company, a Union Pacific subsidiary, were not participated in by any shipper (p. 223). These contentions are entirely beside the point. Appellees do not contend that the advances to the City or the amounts paid Fean and DeOreo for services as leasing agents constitute concessions to shippers. They contend only that such advances and payments establish, among other things, the participation by the Union Pacific with the City in a joint project or undertaking to establish the Kansas City Food Terminal.

Union Pacific employed engineers and architects. At page 219 of their brief, appellants state that the court treats as of no importance what they term undisputed evidence that architects and engineers were employed by the City and paid solely from its funds (p. 219). Possibly the

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[1] R. 908-912.

disregard of appellants' evidence on this point was caused by a consideration of two significant pieces of evidence. The first, a brief colloquy between Commissioner Darby and the architect recorded in the minutes of meeting of Board of Commissioners on June 24, 1937, at which the architect appeared and presented "Architect's and Engineer's Report and Estimates of the Cost for the construction of a Food Terminal for the City of Kansas City, Kansas to be erected on the Public Levee,"—

> "Commissioner Darby asked Mr. Gentry if he has been employed by the City and Mr. Gentry stated that he has not been employed by the City but that he has been getting up figures and plans for the railroad and would be glad to continue the work."[1]

The second, a statement made by W. T. Wellman, an engineer for the Union Pacific, on May 27, 1939, in letter addressed Mr. Haugh:

> "I am suggesting that someone talk to Mr. Gentry and remind him that the Union Pacific Railroad Company employed him on this job, and that if it had not been for the U. P. R. R. Co. he would not have had any connection whatsoever with the Wholesale Food Market and Terminal."[2]

Free and reduced rentals. Appellants also assert that frequent references throughout the court's findings to free and reduced rentals are without foundation; that no free rental is provided in the City's prescribed form of lease; and that "Plainly, its provisions were designed to secure

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[1] Ex. 62-A, R. 2481. The City did not even employ the architects and engineers on a contingent basis until February 10, 1938. (Ex. 62-B, R. 2530-2535.)

[2] Ex. 10, R. 1726. Mr. Haugh concurred in the view expressed by Mr. Wellman, stating, "Mr. Wellman's letter is well merited." (Ex. 10, R. 1727.) See also Stanley to Gentry, Voskamp & Neville, June 3, 1939, Ex. 13, R. 1921-2.

for the City an average rental of $125 per month during the first year of occupancy and $150 per month thereafter" (p. 229-230). This contention is wholly without merit. The "Founder's Lease" approved by the Board of Commissioners on December 6, 1938, for lease of space in the produce buildings, clearly provides for free rental and reduced rental (pp. 13-15, 203-5). That the provisions of the lease were deliberately designed to accomplish that purpose is conclusively established by the testimony of Messrs. Stanley and DeOreo, who stated that the provisions of the lease finally adopted were intended to provide for the free rent which had been expressly included in an earlier draft of the same lease.[1]

Appellants assert that the court below specifically held that the rentals described in the "Founder's Lease" were more than adequate to meet the City's full obligation to the bondholder, pay all of its expenses, including the proposed adjustments, and yield a surplus to the City, and that under these circumstances the provisions of the City's lease cannot be distorted into any proposal of either free or reduced rental (p. 230).

The court did not so hold. It held that all of the rentals and other income of the Public Levee property, *including those from the Kansas City Food Terminal*, would not, after the payment of operating expenses and principal and interest on the bonds, return the City any profit, surplus or dividends, etc., during the first twenty-two years. Its statement was not related solely to the uniform or standard rates of rental provided in the "Founder's Lease." It was based upon all of the rentals from the Public Levee, including those received from the lease of

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[1] R. 623, 1047.

the land occupied by the grain elevator, the Inland Waterways Corporation, etc.

What appellants fail to state is that the calculation of the City upon which the foregoing finding is based was held by the court to be unduly optimistic. The fourth paragraph of the finding reads as follows:

> "The City's forecast of its ability to pay off the bonds in twenty-two years is based upon a ninety per cent occupancy of the market facilities as compared with an actual percentage of occupancy of less than thirty-five per cent at the present time, and there is assumed an ability to exact the same level of rentals when the market buildings become twenty-five or thirty years old as at the present time when they are new. The City's estimate of operating expenses is unduly low by reason of the omission of any sums to cover the annual loss due to depreciation and obsolescence not made good by current maintenance." (R. 360.)

Free radio advertising. Appellants further assert that the undisputed evidence shows that the only advertising discussed was the radio program which the Union Pacific sponsored, and which, by its contract and the testimony of appellees' own witnesses, was confined to the advertising of Union Pacific's rail facilities (p. 230). Not so. The record shows that numerous produce dealers who had leased space at the Kansas City Food Terminal were interviewed on the radio broadcasts sponsored and paid for by the Union Pacific and that they were questioned respecting the quality of their products (p. 12). Mr. Karl Koerper, Vice President of the Midland Broadcasting Company, testified that the fruits and vegetables handled by the person interviewed were the subject of discussion in the interviews.[1]

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[1] R. 688.

Free refrigeration. At page 230 of their brief, appellants state that the undisputed evidence shows that discussions with respect to "free refrigeration" related only to whether such refrigeration was included in the established rental. Sheahan requested free refrigeration for the term of the lease, first, three years and then four years, and Stanley, it is true, stated that the rental would include refrigeration for one year.[1] Ike Sarser also testified that the understanding was "We had the leases, you know, that we shall get refrigeration for the rental."[2] However, it is quite apparent from the record that the refrigeration proposed to be given certain produce dealers represented a service not provided in the uniform or standard rate of rental, and, therefore, constituted an offer of free refrigeration. In letter addressed Mr. Stanley on January 13, 1938, attaching draft of proposed wholesale produce dealer's lease, Mr. Haugh stated, "In Sections 1 and 2 are provisions for the inclusion of free elevator and refrigeration. This draft is prepared so that these items will be correctly covered and not left in the agreement by inadvertence."[3] And in the estimate of income for the Kansas City Food Terminal for the period November 1, 1939 to October 31, 1942, furnished Mattison & Davey, Certified Public Accountants (*found in the files of the Executive Department of the Union Pacific*), separate provision is made for rental received from produce units at the rate of $150 per month and income from refrigeration, it being indicated, however, that there would be no income received from refrigeration for the first year, the estimate bearing the notation, "*1st year gratis.*"[4] These facts indicate that the Union Pacific certainly contemplated the grant of free refrigeration for

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[1] R. 467, 469.
[2] R. 1254.
[3] R. 1563.
[4] R. 3454-3455.

one year in addition to the facilities and services received by the tenant for the uniform or standard rental of $150 per month, and that Messrs. Sheahan and Sarser were offered such free refrigration.

Loans to produce dealers. At pages 231 and 232, appellants argue that the loans made by the Riverview State Bank to produce dealers were found by the court not to be unsecured or inadequately secured and that the Union Pacific had no part in proposing or urging The City Ice & Fuel Company to make the guaranty to the Riverview State Bank through means of which the loans were made to the produce dealers. The matter of the loans and the deposit made by The City Ice & Fuel Company with the Riverview State Bank to guarantee them has been fully discussed herein (pp. 64-69, *supra*).

Rail service of terminal. By finding 15,[1] the court below found that the City leased ground to the Union Pacific for a team track yard and that appellee railroads do not serve the market. Appellants state that this finding wholly disregards the plain terms of the lease under which the Union Pacific is required to switch the cars of all carriers entering Kansas City without discrimination, under duly published tariffs concurred in by all of the railroads, including appellee railroads (p. 225). The answer to this contention is that the Union Pacific is the only railroad which *physically* serves the terminal and freight originating at or destined to tenants of the Food Terminal which moves over the lines of appellee railroads must be switched to and from the terminal by the Union Pacific. Moreover, the requirement that the Union Pacific switch the cars of all carriers entering Kansas City without discrimination does not place appellee railroads upon a fair and equal competitive basis with the Union Pacific in the handling of traffic to the terminal. The matter has previously been adequately treated herein (pp. 88-96, *supra*).

[1] R. 349.

VIII.

Elkins Act Requires Entry of Injunction Whenever Court Finds Violation of Ban Against Concessions and Discriminations.

As already stated, the District Court found that the Union Pacific and the City offered free rents, reduced rents, rental credits, cash payments or bonuses, free advertising, free trips, and unsecured or inadequately secured loans to produce dealers who were shippers by railroad in interstate commerce, to induce them to move to the new terminal.[1] It found that some of the things so offered had been granted or given, including at least free rents, reduced rents, rental credits, free advertising and free trips.[2]

From the facts so found, the Court held as a matter of law that the Union Pacific and the City had offered and given rebates, concessions, advantages and discriminations to shippers in violation of the Interstate Commerce Act and the Elkins Act.[3] It further held that the appellants had participated with others in a subterfuge, scheme, device and conspiracy to violate those statutes.[4] It held that by reason of the acts of the appellants "the produce dealers to whom such concessions have been offered or given will be enabled to and will transport freight in interstate commerce by a common carrier by railroad at less than the published rates on file with the Interstate Commerce Commission and commit discriminations in violation of the Interstate Commerce Act and the Elkins Act."[5]

In this state of the case the Court held that the acts of the appellants should be enjoined as to the future.[6] Ap-

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[1] Findings of Fact, 19-23, R. 351-5; Preliminary Opinion below, R. 243-4.
[2] Findings of Fact, 19 and 20, R. 351-4; Preliminary Opinion below, R. 243-4.
[3] Conclusions of Law, 2 and 3, R. 366-7.
[4] Finding of Fact 4, R. 367-8; Findings of Fact 6 and 7, R. 369.
[5] Conclusions of Law, 2-3, 4-7, R. 366-7, 367-9.
[6] Conclusion of Law, 11, R. 371; Conclusion of Law, 25, R. 376.

pellants contend that no such injunction should have been issued. Except in connection with the subject of rentals, their argument, while not entirely clear, seems to be, for the most part, based on their objections to the holding of the Court that their conduct was illegal, objections which have already been shown to be without merit.

After finding that the law had been and was being violated, the Court had no election as to the remedy to be applied. Section 3 of the Elkins Act mandatorily requires that in such a situation the court shall enfore an observance of the published tariffs or direct and require a discontinuance of the discrimination.[1] The injunction of the court was issued in pursuance to that mandatory duty. It was directed strictly in conformity with the statute against the railroad which had been engaged in the carriage of freight traffic between given points at less than the published rates on file and committing discriminations forbidden by law; and also against the City which, as the owner and operator of a part of a railroad terminal, was a party interested in the traffic. The injunction ordered the appellants to stop the practices found to be illegal; it restrained them from offering or giving "cash payments or rental credits, free rents and reduced rents, unsecured or inadequately secured loans constituting concessions, or other valuable considerations" to the shippers to induce them to patronize the

[1] The provisions of this section, so far as material on this point, are as follows:

"That whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discriminations forbidden by law, a petition may be presented alleging such facts * * *, and upon being satisfied of the truth of the allegations of said petition said court shall enforce an observance of the published tariffs or direct and require a discontinuance of such discrimination by proper orders, writs, and process, which said orders, writs, and process may be enforceable as well against the parties interested in the traffic as against the carrier, subject to the right of appeal as now provided by law."—Section 3 of the Elkins Act, 49 U. S. C. 43.

terminal, and it forbade leasing facilities at the terminal in such a way as to effect a discrimination between shippers or as to yield less than "a proper rate of return upon the full value of the market facilities as a whole, after making provision for all expenses of operation, including maintenance and depreciation."[1]

While it is largely confined to prohibiting the specific types of concessions which had been offered or given to the produce dealers, the injunction is nevertheless broad enough to prohibit for the future any continuation of the definitely developed policy of the appellants to build up the business of the Kansas City Food Terminal by giving rebates, concessions, advantages and discriminations to shippers.

The court did not enjoin the appellants from any and all future violations of the Interstate Commerce Act and the Elkins Act; it restrained only the particular violations the appellants had committed in obtaining business for the Kansas City Food Terminal. In this there was no error. Had the restraints imposed been more limited in scope they would have fallen short of preventing the very violations of law which the court found to have been committed, and the injunction would have stopped short of commanding full adherence to the law. The court properly framed its order commensurately with the violations which had already taken place.

It is a well established rule that an injunction designed to stop violations of the law may be couched in terms broad enough to prevent a repetition not only of the same type of acts but also of the plan, policy or course of business pursuant to which the illegal acts have been committed. In *New Haven* v. *Interstate Commerce Commission*,[2] the Chesapeake and Ohio Railway had pursued the business policy of buying coal produced along its line and selling it in the mar-

[1] Order Granting Permanent Injunction, R. 378-9.
[2] (1906) 200 U. S. 361.

kets of the country, retaining the difference between the purchase price and the selling price as its compensation for carrying the traffic, which at times was less than the published tariff rate. It made agreements to sell coal to the New Haven Railroad at a price substantially less than cost at point of origin and transportation rates to destination, the difference being $1.17 a ton, which the court found could be referable only to a rebate of that amount for the transportation service performed by the Chesapeake and Ohio from the mines in West Virginia to shipside at Newport News. The Government brought suit under Section 3 of the Elkins Act against the Chesapeake and Ohio and the New Haven to enjoin enforcement of the agreements and to restrain the Chesapeake and Ohio from accepting or receiving any rebate, concession or discrimination in respect of the transportation of any property in interstate commerce.[1] The lower court, while enjoining the parties from carrying out the agreements, refused to go any further, and both sides appealed. This court, after sustaining the contention that the agreements were illegal, overruled the contention of the Government that the Chesapeake and Ohio should be enjoined in general terms from violating the Act in any particular in the future, but held that the injunction should have been framed to prohibit not only the enforcement of the agreements in question but also to prohibit the Chesapeake and Ohio from taking less than its published tariff rates by means of dealing in the purchase and sale of coal. The court thus not only enjoined the particular acts but also the whole plan, scheme or policy found to be illegal.[2]

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[1] 200 U. S. 361, 383.

[2] The court said at page 405:

"As the court below did not decide that the second and sixth sections of the act, relating to the maintenance of rates, had been violated, the injunction, by it issued, was not made as directly responsive to the commands of the statute on that subject as we think it should have been. We, therefore, conclude that the injunction below should be modified and enlarged by perpetually

The same rule finds exemplification in the subsequently decided case of *Chicago, Ind. & L. Ry. Co.* v. *United States*.[1] The Attorney General, at the request of the Interstate Commerce Commission, caused the institution of a suit against the railroad company under Section 3 of the Elkins Act, to enjoin the enforcement of a contract with the Frank A. Munsey Company, magazine publishers, to give tickets for the transportation of passengers in exchange for advertising. The petition also alleged that the railroad had entered into like contracts with some 251 other publishers, and that it had furnished transportation under the terms of all of such agreements. The lower court enjoined the defendant from further executing any of the pending contracts, and went on further to enjoin it from further carrying out its business policy of accepting advertisements in lieu of money for interstate transportation. The decree was affirmed by this court, which, however, confined its discussion to a consideration of the question whether the practice complained of is illegal.

The rule applied in these cases involving injunctions under the Elkins Act has recently been applied by this court in a case under the Wagner Act, where a cease and desist order of the National Labor Relations Board was found unduly broad. Merely upon the basis of a finding of violation of one provision of the Act the Board had issued a blanket order requiring respondent to cease and desist from violating any of the provisions of the statute. The court, although condemning this prohibition as unduly broad, expressly declared it to be a sound principle that where one has been found to have committed acts in violation of law,

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enjoining the Chesapeake and Ohio from taking less than the rates fixed in its published tariff of freight rates, by means of dealing in the purchase and sale of coal."

[1] (1911) 219 U. S. 486.

he may under the broad powers of a Federal Court be restrained from committing other related unlawful acts.[1]

The appellants suggest, if indeed they do not directly contend, that because under their theory of the findings and of the facts, the concessions, even assuming them to be unlawful, were in no case actually granted or given, and therefore, no injunction may be granted under Section 3 of the Elkins Act, because it has not been established, in the language of the statute, that any common carrier, at the time of the bringing of the suit, was engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or committing any discriminations forbidden by law. The first answer to this contention is that it is based on an incorrect assumption regarding the nature of the findings and of the evidence on the issue whether the concessions were granted and given as well as offered. As already stated, both the findings of fact and the evidence on the subject show that some of the concessions had been actually given. An equally conclusive answer is that agreements were in point of fact made to

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[1] *National Labor Relations Board* v. *Express Publishing Co.*, decided March 3, 1941, —U. S.—, 85 L. Ed. 614, 619-620. The court said in the course of its opinion:

"A federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future unless enjoined, may fairly be anticipated from the defendant's conduct in the past. * * *

"It is a salutary principle that when one has been found to have committed acts in violation of a law he may be restrained from committing other related unlawful acts. * * *

"* * * The breadth of the order, like the injunction of a court, must depend upon the circumstances of each case, the purpose being to prevent violations, the threat of which in the future is indicated because of their similarity or relation to the unlawful acts which the Board has found to have been committed by the employer in the past. See *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 308, 309; *Standard Oil Co.* v. *United States*, 221 U. S. 1, 77; *Texas & New Orleans R. R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548; *Local 167* v. *United States*, 291 U. S. 293; *Virginian Railway Co.* v. *System Federation No. 40*, 300 U. S. 515, 541, 543, 544."

give the concessions, which is the legal equivalent of actually giving them, it being unnecessary to await the actual transfer of the money or property before bringing suit. In *United States* v. *Union Stock Yard* [1] the action was brought to restrain the performance of a contract whereby the Stock Yard Company agreed to pay a bonus to a firm of shippers for locating its packing plant adjacent to the stockyards. It is clear from the statement of facts in the case that the bonus had not been paid [2] at the time suit for an injunction was brought, and yet this court decided that performance of the contract should be enjoined.[3]

The appellants likewise contend that in no event may an injunction be issued against the City, because Section 3 of the Elkins Act permits an injunction only against a common carrier by railroad and a shipper who may be engaged with it in some rebating transaction. They cite in support of their contention the decisions of this Court and of the Commerce Court in the case so frequently referred to by both sides in this case, *United States* v. *Union Stock*

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[1] (1912) 226 U. S. 286.

[2] See 226 U. S. 286, 301-2, 306, 308-9.

[3] 226 U. S. 286, 308-9. It may be noted that the court stated at page 306 that no objection was made as to the manner and form in which the jurisdiction of the Commerce Court was invoked. This has reference to another matter—to the way in which the suit was brought in the Commerce Court. Action was commenced in that court by a single bill asking for both an injunction and a writ of mandamus. The court said this was bad pleading but passed the matter over because none of the parties raised any objection. The Commerce Court said:

"Although the petition is clearly multifarious in joining mandamus proceedings, authorized by the act to regulate commerce, to secure compliance with its provisions, and injunction proceedings, authorized by section 3 of the act to further regulate commerce, known as the 'Elkins Act' (Act Feb. 19, 1903, 32 Stat. 848), to restrain an alleged illegal rebate and discrimination, inasmuch as defendants do not raise this objection, we shall, without approving such practice, proceed to a determination of the petitioner's rights under both aspects of the case."—*United States* v. *Union Stockyard & Transit Co.* 192 F. 330, 333.

Yard,[1] but neither this Court nor the Commerce Court interpreted the statute in accordance with the contention advanced. The Commerce Court, after declaring that the Government's bill contained two causes of action, one of mandamus and the other for injunction, held that there was no authority for bringing a suit for an injunction to restrain the enforcement of the contract for a bonus because none of the defendants in that cause of action were common carriers; and Section 3 of the Elkins Act permits such a suit only where one of the parties defendant is a common carrier.[2] The court clearly implied that where, as here, one of the parties named as defendant is a common carrier, other parties might be joined and relief might, in a proper case, be given against them even though they may be non-carriers.[3] This Court held, when the case reached here on appeal, that the Stockyard Company, which the Commerce Court had found to be a non-carrier, was in fact a common carrier subject to the statute. The question whether a suit may be maintained under Section 3 of the

[1] (1912) 226 U. S. 286; the decision of the Commerce Court is reported in 192 F. 330.

[2] The court said:

"While section 1 of the Elkins act as amended (Act June 29, 1906, 34 Stat. 584, 587), after prohibiting 'any person or corporation' from rebating or discriminating in respect to an interstate transportation, subjects to criminal prosecution 'any person or corporation, whether shipper or carrier,' who knowingly violates its provisions, section 3 of the Elkins act, under which this suit is brought, authorizes equity proceedings to enjoin such offenses only when a 'common carrier' has committed or is about to commit them. * * * We have found it unnecessary to determine or even to consider it, in view of our conclusion that neither the Stockyard Co. nor the Investment Co. is a common carrier."—*United States* v. *Union Stock Yard*, 192 F. 330, 343.

[3] The court said on this point:

"If, as we interpret sections 2 and 3 of the Elkins act, a proceeding thereunder in equity cannot be maintained against parties other than a common carrier engaged in interstate commerce, *unless on proper allegations relief is also sought against the commission by such a carrier* of one or more of the acts therein prohibited, the fact that the Junction Co., which is such a carrier, is a party defendant on the other branch of the case furnishes no basis for this proceeding against the other defendants."—192 F. 330, 348. (Italics ours.)

Elkins Act against a person not a carrier when as here named in a suit against a carrier is not even mentioned in the opinion of this Court.

But as already indicated, the statute itself answers the question in so far as it is involved in the case at bar. It distinctly provides that an injunction "may be enforced as well against the parties interested in the traffic as against the carrier." The suit here was brought both against the Union Pacific, which is a common carrier, and the City and its officials, who admittedly are not common carriers, as well as against various other persons including the shippers involved in the concessions. The District Court granted relief against all of the defendants, including not only the carrier but the City and its officials. The latter are, because of the City's ownership and operation of part of the railroad terminal, "parties interested in the traffic," and when relief was granted against the carrier, it was also properly granted against them.

IX.

Lower Court Was Within Authority in Enjoining Lease of Facilities at Free or Inadequate Rentals.

1. *When Court Found That Rental Concessions Had Been Given It Was Under Duty To Enjoin Them.*

The chief force of the appellants' attack against the injunction issued by the court below is directed against the provisions relating to rental concessions, in which the court restrained them from offering or giving "free rents," "reduced rents," and "rental credits," and from permitting shippers to occupy the warehouses except at rentals "which will yield a proper rate of return upon the full value of the market facilities as a whole, after making provision for all expenses of operation, including mainte-

nance and depreciation."[1] Although these restraints would seem to be in the same category as the others, and the duty to impose them as well as the others to be clearly incumbent upon the court under the statute as it has been uniformly construed by this Court, appellants single them out for an attack which often takes extreme forms. The court, it is contended, was without power to restrain the City from exercising the full discretion which it had under the statutes of Kansas in fixing rates for rental of the terminal. The court is accused of usurping powers expressly conferred upon the City by the State statute and of violating elementary principles of justice.

Basically, however, the situation with respect to rentals is the same as with respect to the other concessions. The free rentals, were, under the findings of the case and under evidence which is uncontradicted if not undisputed, not only offered by the Union Pacific and the City but actually given, at least by the City—and as appellees contend, also by the Union Pacific.[2] The law had been violated, and the statute required the issuance of injunctive process to stop the same and related violations in the future. The injunction was properly issued against the City and its officials because they are within the purview of the prohibition against the offering or giving of concessions by "any person, persons, or corporation,"[3] as well as among "the parties interested in the traffic,"[4] against whom the statute requires the injunction to issue.

It has already been demonstrated that the State statute constitutes no defense for the City, because it is not in any way in conflict with the Elkins Act, and could not, even if

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[1] Order Granting Permanent Injunction, R. 378-9.
[2] Findings of Fact 19 and 20, R. 351-4; McIntyre, R. 660-1; Mallin, R. 1286-8.
[3] Section 1 of the Elkins Act, 49 U. S. C. 41(1).
[4] Section 3 of the Elkins Act, 49 U. S. C. 43.

the situation were otherwise, prevail over the paramount Federal law outlawing these particular offenses against interstate commerce.

2. *Ramifications of Rental Concessions and Persistence of Appellants in Giving Them After They had been Prohibited by Temporary Restraining Order and Preliminary Injunction Required Court so to Frame Remedy as to Effectually Stop Violations of Law.*

There were special reasons why the court below should have couched the terms of the injunction in the matter of rental concessions with somewhat greater definiteness and strictness than in the case of the other concessions. The evidence showed a variety of schemes to give rental concessions. Two different types were provided for in the standard form of lease which the shippers were solicited to sign and which many did sign. They were (1) free rental from the time of moving in until some date to be specified as the time of official completion of the terminal,[1] which the shippers were told, in at least some instances, would be delayed for many months;[2] and (2) the payment of only one-third of the standard rental for the next ensuing three months.[3] Another type of inducement offered was a concession under the rentals named in the regular form of lease, the shipper being offered a rental credit to be applied on his rent as it became due at the terminal, the credit running as high as $9,000 in one case.[4]

Another and much more important reason for a strict and definitely expressed restraint upon rental concessions in the final injunction order lay in flagrant disregard by

[1] Ex. 62-B, pp. 59-63, R. 2616-24.
[2] R. 393, 427, 1814-15, 2361-4.
[3] Ex. 62-B, pp. 59-63, R. 2616-24.
[4] R. 83; Ex. 27, R. 2174.

the appellants of previous orders of the court. The temporary restraining order and the preliminary injunction, in both of which rental concessions were prohibited, were disobeyed by the appellant City; and the appellant Union Pacific is shown to have participated in a scheme to evade the preliminary injunction. The temporary restraining order of December 29, 1939, forbade the appellants from giving shippers "any cash payments and all free rentals and all other valuable considerations."[1] The preliminary injunction of April 10, 1940, restrained the appellants from offering or giving "rental credits, free rents, and reduced rents * * * or other valuable considerations;"[2] and it contained a clause, which the court added because of the disobedience of the free rental ban in the temporary restraining order, requiring, during the pendency of the litigation, the observance of the standard rates of rental fixed by the defendants themselves in the amount of $150 per month for produce warehouse units, and $1.10 per square foot per annum for office space for substantially complete facilities, with the reservation that where the facilities were not substantially complete the rental should be that proportion of the standard rental which the proportion of actual utilization of the facilities bears to their complete utilization.[3]

There cannot be the slightest doubt that both of these orders were violated. The produce terminal, then substantially complete, was formally opened on December 4, 1939, and most of the defendant produce dealers moved into wholesale store units in the warehouses on that date or shortly afterwards. Nevertheless Mr. Charles I. Mc-

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[1] Temporary Restraining Order, filed December 29, 1939, R. 92-3. The same provision was carried over in the Modified Temporary Restraining Order filed January 3, 1940, R. 96.

[2] Order Granting Preliminary Injunction of April 10, 1940, R. 290.

[3] Id. R. 291.

Intyre, Assistant City Auditor, testified on February 28, 1940, almost three months later, that "we haven't received a dime of rent."[1] During the course of subsequent testimony, on March 11, he stated no rentals had been collected from produce dealers up to that time.[2] One produce dealer testified that "he had signed a lease for two units, * * * his rent was to be $100 a month for the first three months and $300 a month for the period of the lease * * * that he did not pay any rent after moving on the units in the Kansas City Food Terminal."[3]

In Supplemental Findings of Fact, entered on April 5, 1940, in connection with the preliminary injunction, the Court found that notwithstanding the temporary restraining order the appellants "had not collected any rent from said produce dealers * * * as of March 11, 1940."[4] It was on the basis of these findings that the Court inserted the strict provisions already mentioned in the preliminary injunction. But even after the preliminary injunction had been entered, with its more stringent provisions requiring the interim observance of the City's standard rates of rental, the appellants continued to allow the shippers to use the premises without paying rent.[5] Mr. Stanley, instead of attempting to secure payment of rent by the shippers in obedience to the preliminary injunction, or at least keeping hands off the matter, sought to devise a subterfuge whereby the tenants could pay a maximum of forty per cent of the standard rentals. The scheme was to convert the reservation made by the Court in issuing the injunction for a proportionate abatement of rent for incomplete facilities into a vehicle for continuing the regime of concessions.

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[1] McIntyre, R. 690-91.
[2] McIntyre, R. 951. See also, Payne, R. 694.
[3] Robinson, R. 564.
[4] Supplemental Findings of Fact, filed April 5, 1940, R. 286, 287.
[5] Mallin, R. 1286, 1288.

Mr. Stanley addressed a meeting of the tenants of the terminal, telling them that there would be some engineers making a survey regarding the degree of completion of the several produce warehouses and to check up on the refrigeration, lack of refrigeration, and similar matters; "There will," he said, "be a possible change—the rentals will be lower."[1] Mr. Stanley had no trouble in forecasting the conclusions which the engineers would reach. He was unmistakably acquainted with the purpose for which the experts had been hired.

The experts of course produced the desired results. One of the shippers, Mr. Ike Sarser, on the stand May 1, testified that after the completion of the engineering survey he was told by Mr. Cooksey that [illegible] would be required to pay only forty per cent of the standard rate of rental, and that he gave Mr. Cooksey a check on that basis.[2]

During the promotional stage of the terminal the Union Pacific and the City promised free rent, reduced rent, and rental credits to prospective tenants. When the tenants moved into their quarters they naturally expected to receive the concessions which had been promised them. The Union Pacific, anxious for the traffic of the shippers, plainly bent its efforts to make good on its previous promises.

The evidence before the court thus demonstrated that the appellants, as long as they retained any leeway with respect to the rentals, would waive them or adjust them downward to give concessions to the shippers. Under these quite extraordinary circumstances the court properly provided a definite standard for determining the point below which the appellants could not go in their efforts to carry out their promises to give rental concessions. It had already been

[1] Mallin, R. 1286-8.
[2] Sarser, R. 1256.

demonstrated that it was not enough to forbid in broad and general terms free rentals, reduced rentals, and rental credits and that to do so again in entering a final injunction would in all probability be ineffectual.

Giving shippers the use of premises at an inadequate or subnormally low rent, as Mr. Stanley is shown to have planned, is just as illegal as the giving of free rent.[1] Both contravene the language of the statutes against rebates and concessions. The difference is merely one of degree. In the one case the whole rental value of the premises is an absolute gift to the shipper; in the other case only part of the rental value is given free, but it is none-the-less a gift and under the statutes any gift made a shipper in respect to transportation is illegal. If the rental value of a wholesale store is $150 a month and the use of the premises is given free, the gift of the whole amount is, of course, a rebate and a concession. If in another case the lessor charges the shipper $50 a month rent,[2] the difference between that figure and the full rental value, amounting to $150, is just as plainly a rebate or concession.

In spite of the violation of the temporary restraining order and the preliminary injunction, the court could not very well have forbidden the appellants to lease the wholesale stores or other facilities to shippers. It did not for a moment consider any such drastic remedy; it clearly recognized the right to lease the property so long as the law against rebates and concessions is not violated. The court undertook to do nothing more than to stop the persistent and contumacious violations which had already occurred, and to prevent the appellants for the future (1) from giving

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[1] *Baltimore & Ohio R. R. Co. v. United States*, (1939) 305 U. S. 507; *Cleveland, C., C. & St. L. Ry. Co. v. Hirsch*, (C. C. A. 6th, 1913) 204 F. 849.

[2] The $50 per month rent used in this illustration is the rent which the appellants proposed to charge for the first three months, after which it was theoretically to be increased to $150 per month. Ex. 62-B, p. 60, R. 2618.

free rents and (2) from carrying out their promises to give reduced rents, either by charging one-third of the standard rate of rental for the first three months or by allowing the special forms of rental credits and rental abatements arranged by Mr. Stanley.

3. *Court Prescribed no Minimum Rates but Merely Minimum Lawful Standard of Rentals below which Appellants Could not go in Renting Property to Shippers.*

Although asked by the Government to fix specific minimum rentals as the only definite, certain, and effective means of putting a stop to the persistently unlawful conduct of the appellants, in the course of which they violated both the temporary restraining order and the preliminary injunction, the District Court expressly declined to do so. The court held that in its opinion the prescription of a minimum rental would be tantamount to prescribing a rate for the future, which is a legislative function and outside the scope of judicial authority.[1]

In framing the injunction the court confined itself to prohibiting free rents, reduced rents, and rental credits, as well as the leasing of property at the terminal without the paying of rental "which will yield a proper rate of return upon the full value of the market facilities as a whole, after making provision for all expenses of operation, including

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[1] Memorandum Opinion on Final Hearing, filed July 8, 1940, R. 337; Supplemental Memorandum on Final Hearing, filed July 13, 1940, R. 376-7. In the latter opinion the court said:

"As noted in the memorandum opinion heretofore filed, we are dealing now with the question of whether the facts show at present a violation of the law and not in suppositions as to what future violations may possibly occur. And while the order made in this case will enjoin future acts, such inhibition will be made in the light of the present facts and be not based upon the presumption of facts conceivable but not now existing. It is for rate-making bodies acting as the arm of the legislative branch of the government to fix rates *in futuro*. The court determines the existence or non-existence of a violation of the law upon existing facts." R. 377.

maintenance and depreciation."[1] Very clearly this prescribes no rate, minimum or otherwise. It is nothing more than a legal standard for determining the lowest point at which the appellants may fix their own rentals without renewed violation of the statutes prohibiting rebates and concessions. Appellants are left free, so long as they observe the lawful standard so declared, to charge any rentals they see fit, and to change or modify them whenever they may be so advised.

The lower court likewise held that the prescription of a minimum rate of return for future application would be unauthorized, because such rate of return must be determined in the light of facts which will exist in the future and which cannot be judicially determined in advance. Although the court, as part of the procedure which it followed in judging the lawfulness of existing standard rentals established by the appellants—which resulted in holding them lawful—made findings with respect to value and operating expenses, such findings were made only as of the time of the decision and not for the future. The court recognized that the several factors involved in the application of the standard which it prescribed for the future, such as value, rate of return, operating expenses and depreciation, vary with the times, always reflecting facts and conditions currently existing. The course it adopted made every allowance for future fluctuations in value of the property, rate of return and the like; and left the appellants free to make their own determination of these factors from time to time and to make such changes in rental rates as the conditions affecting the factors may warrant, subject only to the condition that the determination must be made in good faith, and not as part of a scheme to continue the regime of concessions.

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[1] R. 379.

4. Injunction Against Leasing Property to Shippers at Rentals Falling Below a Lawful Minimum Standard is Within the Judicial Authority of the Court.

The appellants contend that when the court prescribed the minimum standard to be observed in leasing property to shippers it went beyond the limits of judicial authority and usurped a legislative function. They cite decisions in support of the argument that rate-making is a legislative function which may not be exercised by the courts. We have no quarrel with the established rule that rate making is a legislative function, and as such, is beyond the power of the courts.

But the District Court here exercised an essentially judicial function,[1] justified not only under its inherent equity powers,[2] but under special statutory authority granted by Section 3 of the Elkins Act to "enforce an observance of the published tariffs or direct and require a discontinuance of such discrimination by proper orders, writs, and process." The court has done nothing more than to enjoin a violation of law, which is a purely judicial function. In carrying out this purpose by prescribing a minimum standard to be observed in the future by those found to have violated the law in the past, it is doing nothing more than to declare what under the circumstances of the case is the

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[1] Discussing this judicial function, Reeder on The Validity of Rate Regulations (1914) at page 108 says:

"But while the legislature has the power to change the law and to prescribe the rates which shall be charged in the future, and while the courts have not the power to change the law, judicial acts are not always strictly retrospective, for as a general rule *a court may require the observation in the future of the law as it stands at the present time. This may be done in a proceeding for a mandamus or an injunction.*" (Italics ours.)

[2] In *Ober* v. *Gallagher*, 93 U. S. 199, 206, it was said that a Circuit Court "having obtained rightful jurisdiction of the parties and the subject matter of the action for one purpose, the court will make its jurisdiction effectual for complete relief." (Citing Story's Eq. 64 k.)

law governing the determination of the minimum permissible rental and to require them to obey in the future the rule of law so laid down. What could be more judicial in character than a declaration of the law applicable to a given state of facts followed by an order enforcing its observance?

The legislative function proceeds upon a quite different basis. It is concerned not with declaring and enforcing existing law, as the court has done in this case, but in prescribing a rule for the future. Rate-making is a legislative function and no one contends to the contrary. And this function can be exercised only by the legislature or a duly appointed administrative tribunal acting as its agent. The Federal courts are without legislative or administrative authority of this or any other character. The court below has no regulatory power over the rentals at the Kansas City Food Terminal, and the court not only recognized this fact but scrupulously refrained from essaying the exercise of any such power. It confined its action to a restraint upon leases which give shippers the use of premises wholly or partly rent free, in violation of the statutes against rebates and concessions. In so doing it was not regulating rentals; it was not exercising a legislative or an administrative function, but a strictly judicial one.

It is a complete *non sequitur* to say, as the appellants do, that because fixing rates for the future is a legislative function, the court, in declaring a standard of lawful rentals and requiring its observance for the future, is exercising a legislative function. The conclusion does not follow from the premise; it would follow only if it were true that all governmental powers exercised *in futuro* are legislative in character. But this is far from the case. It is a firmly established characteristic of the essentially judicial process of injunction that it operates *in futuro* wherever necessary in granting

adequate relief as in preventing the commission and continuance of unlawful acts.

In *West Virginia Northern R. Co.* v. *United States* (C. C. A. 4th), 134 F. 198, a petition for mandamus was filed by the relator charging that the respondent railroad company, in the transportation of coal mined, had been discriminating in favor of other coal companies through control of the railway coal car supply. The lower court entered judgment against the railway company, directed the percentage of cars that the relator should have, and commanded that the railway company furnish such percentage of cars to the relator. Although it was admitted that it was the duty of the railway company to distribute the cars it received without unreasonable preference or prejudice in view of the fact that the Acts of Congress forbade discrimination, on appeal it was urged by the railway company that the court had no power to fix the percentage of the cars the relator should have. The Circuit Court of Appeals held otherwise and stated[1] that the judgment of the District Court did no more than to correct the unlawful discrimination.

In effect, the District Court required the observance in the future of the law as it stood at the time of the entry of the final decree. This action was not novel. Shortly before the turn of the century, Chief Justice Oliver Wendell Holmes, of the Supreme Judicial Court of Massachusetts,

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[1] In *West Virginia Northern R. Co.* v. *United States* (C. C. A. 4th), 134 Fed. 198, the Court said:

"We are unable to accept the view that Congress intended to confine the scope of the writ to admonition merely, or to a general command to desist from discrimination, rather than from the particular action in which the discrimination consisted. By the findings, the delivery to relator of any less than 31% of the supply amounted to unlawful discrimination, *and the judgment of the court did no more than to correct it.* * * * It is true that proceedings in equity are more elastic than proceedings at law, but the question before us is whether the order was justified when it was entered and we perceive no reason for holding that it was not." (Italics ours.)

pointed out that under a Massachusetts statute providing that persons aggrieved by the price charged for water by certain water companies could appeal to the Supreme Judicial Court to have the rate fixed at a reasonable sum, such appeal was a proper matter for judicial determination.[1] Chief Justice Holmes, while agreeing fully that it was not the function of the court to establish a schedule of rates, held that if it legitimately might be left to the court to decide whether a charge for water furnished was reasonable, and if not, to cut it down to a reasonable sum,

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[1] In *Janvrin* v. *Revere Water Company*, 174 Mass. 514, 517, 55 N. E. 381, 382, Chief Justice Holmes stated:

"* * * It does not undertake merely to make of the court a commission to determine what rule shall govern people who are not yet in relation to each other, and who may elect to enter or not to enter into relations as they may or may not like the rule which we lay down. It calls on us to fix the extent of actually existing rights. With regard to such rights, judicial determinations are not confined to the past. *If it legitimately might be left to this court to decide whether a bill for water furnished was reasonable, and, if not, to cut it down to a reasonable sum it equally may be left to the court to enjoin a company from charging more than a reasonable sum in the immediate future.*" (Italics ours.)

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"It is true that in Reagan v. Trust Co. it was said, also that 'it is not the function of this court to establish a schedule of rates' (154 U. S. 400, 14 Sup. Ct. 1055; 38 L. Ed. 1024); and to that proposition we fully agree. But it will be observed that the proposition is laid down in connection with the statement that 'the challenge in this case is of the tariff as a whole, and not of any particular rate upon any single class of goods.' Probably to prepare a new schedule or to rearrange the old one would have gone beyond the scope of the rights immediately affected or threatened in the case before the court, into the realm of abstract law making for the future, and so beyond the power of the court; and, if it had not been beyond the court's power, still very possibly it might have been refused, in the court's discretion, the court leaving it to the proper body to undertake the task. But it is implied that, if the challenge had been of a single rate threatened to be charged for a service demanded, the court might have determined the question, between the parties for the immediate future, as it is stated three pages earlier that the court would determine it with regard to a charge for past services. When you are prepared to say that a given charge is too high or too low, it hardly would be consistent to say that you had not power or ability to say what is a proper charge."

it equally may be left to the court to enjoin a company from charging more than a reasonable sum in the immediate future.

So it is that the cases which the appellants have cited, to the effect that rate-making is a legislative rather than a judicial function, are entirely beside the point. The situation here differs widely from one where the court is asked to review, upon constitutional or statutory grounds, an order of some administrative agency fixing rates where the sole question is the validity of the order, where questions of comity between different branches of government as well as questions of the limits of judicial power are involved. We have in this case no order of a rate-making tribunal. The acts of the City under review here are those performed as manager or one of the managers of the Kansas City Food Terminal. They are the acts of the manager of the business in respect to a matter of contract, and not the acts of a regulatory commission engaged in the process of rate-making. The City admittedly has participated in the construction and operation of the terminal in a proprietary rather than a governmental capacity. There is no regulatory commission, State or Federal, with jurisdiction over the rentals to be charged for the use of the warehouse facilities. The court below was proceeding not to review the order of a regulatory agency but to inquire into the legality of rental contracts used as a devise for violating the law against rebates, concessions and other departures from published tariffs.

In reviewing the cases cited by appellants on this question, it is to be borne in mind that not all of the powers of regulatory bodies over rates are legislative or administrative in character. Some of them, such as those involved in determining the reasonableness of past rates,[1]

[1] *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 U. S. 370, 384-5, 389.

or even in declaring the rules of law applicable in fixing rates for the future, are really judicial or quasi-judicial functions.[1]

The cease and desist order—the administrative equivalent of an injunction[2]—of the Interstate Commerce Comsion reviewed by this Court in *Baltimore & Ohio* v. *United States*[3] may be said to have been issued in the exercise of a quasi-judicial power. The Commission, by its order, required the carriers to stop leasing warehouse space at rentals which failed to compensate them for the cost of providing the service, thus prescribing a standard to be followed in the future, just as the District Court has required the observance of a standard for the future in the case at bar. This Court upheld the order as within the cease and desist powers of the Commission. Surely the District Court, armed with the inherent powers of a court of equity and the special mandate found in Section 3 of the Elkins Act, possesses authority to put an effectual stop to rebates and concessions at least equally as far reaching as

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[1] Thus one of the closest students of the regulatory process says that a minimum rate order of a commission prescribing the limits below which rates may not fall is like the issuance of an injunction by a court, an exercise of a judicial rather than a legislative function. Robert L. Hale, "Commissions, Rates, and Policies," 53 Harv. L. Rev., 1103. At page 1106 the author states:

"If the Commission merely prescribes the limits above and below which the rates may not fall, and if these are the same limits outside of which a rate would already have been unlawful, the issuance of its order has an effect similar to that of a court decree enjoining specified conduct which would have been illegal before the injunction. The party enjoined may not have known that it was illegal, and, but for the injunction, he would be liable only for damages for the illegal act. The injunction informs him of his specific duty, and adds a sanction to its observance. So, too, does a rate order of the type supposed. *In issuing it, the Commission, like the judge who grants an injunction, can hardly be said to be exercising a legislative function.*" (Italics ours.)

[2] See *Arizona Grocery* v. *Atchison Ry.*, 284 U. S. 370, 388.

[3] (1939) 305 U. S. 507.

those of the very administrative tribunal which in this case has applied to it for assistance in the enforcement of the law.

X.

Court Properly Restrained Rentals Which Gave Shippers Use of Property Without Paying Return on Its Value.

The District Court, upon finding that while the standard rates of rental were not unlawfully low, the appellants had nevertheless not observed them, but had unlawfully given free rents, reduced rents, and rental credits to the shippers, set about to frame the final injunction in such a manner as to prevent similar violations in the future. It prohibited the appellants from allowing the shippers to occupy the facilities of the terminal unless they "shall pay rental hereafter * * * which will yield a proper rate of return upon the full value of the market facilities as a whole after making provision for all expenses of operation, including maintenance and depreciation."[1]

The appellants, in addition to denying the authority of the court to enjoin rental concessions, attack the standard thus determined by the court for fixing the minimum point below which the rentals may not go without amounting to an unlawful concession to shipper lessees. The standard involves the application of three principal factors: (1) "The full value of the market facilities as a whole," (2) "a proper rate of return," and (3) "all expenses of operation, including maintenance and depreciation."

1. *The Rental Clause of Injunction is Justified.*

Under the Interstate Commerce Act and the Elkins Act leases of property to shippers by railroads or owners or operators of transportation facilities, or those associated

[1] Order Granting Permanent Injunction, R. 379.

with them, may not be made at rentals so low as to constitute a device for indirectly making a gift or dispensing a favor to the shipper. There is no inflexible formula by which existence of a gift may be determined or its exact extent measured.[1] Sometimes it is the rental value of the property, determined by the going rates of rental of

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[1] In *Baltimore & Ohio R. R. Co.* v. *United States* (1939), 305 U. S. 507, this Court, while upholding an order of the Interstate Commerce Commission prescribing cost of providing the service as the test under the circumstances there existing, nevertheless pointed out that the test is not unvarying, saying that in other situations reasonable or market value charges may well be the test. The Court said (pp. 523-4):

"* * * Section 6(7) of the Act forbids the carrier to receive less than the published rates for transportation or to remit 'by any device any portion of the rates.' When services, not necessary for transportation are furnished below cost in an effort to acquire rail transportation, * * * this provision is violated. * * *

"This is not to say that for every situation it is necessary that accessorial services should be rendered at not less than cost, rather than market or fair value. The Commission pointed out it was not condemning bona fide storage-in-transit for milling, manufacturing or processing, but only the storage practices indulged in here to get rail transportation. In other circumstances fair value and market have been recognised as legitimate bases. *Where competitive practices such as existed here are absent, reasonable or market value charges may well be the test.*" (Italics ours.)

In *Freight Forwarding Investigation* (1938), 229 I. C. C. 201, in condemning leases of warehouse properties by railroads to freight forwarders, the Commission said at pages 215 and 216:

"The varying conditions under which the different properties are leased render it impossible to establish any uniform rate of return below which the rail lines may not lawfully lease their property to shippers. The record establishes, however, that certain of these properties yield less than a lawful return when leased to shippers as here, especially where the rail lines have constructed the facilities specifically for the forwarders. It seems clear that where the rail lines have leased facilities not specially constructed for the forwarders, the rental should at least equal the taxes, maintenance, and operating expenses. Manifestly, inadequate rentals cannot be justified on the ground that it is better to have the property occupied than to lie idle. If forwarders have use for such facilities they must necessarily be of some value from a commercial standpoint, whether rented from a rail line or from others. Respondents should lease facilities to forwarders at terms certainly no less favorable to the lessors than are embodied in leases by others of somewhat similar facilities in the same general community. *Leases and Grants by Carriers to Shippers*, 73 I. C. C. 671, 683; *Wharfage Charges at Atlantic and Gulf Ports, supra.*"

property of the same kind; sometimes it is what will reimburse the owner by way of out-of-pocket costs in the way of maintenance and taxes; sometimes it is what will yield the cost of operation and a fair return on the investment; at other times it is what is required to pay operating expenses and yield a fair return on the value of the property.[1] The rental to be applied is to be determined by the circumstances of the particular case, always bearing in mind that the statute will not permit any gift to be made to the shipper and will not countenance any rental below the market value of the use of the premises furnished.

Under the circumstances of the present case, any test based upon rental comparisons is inapplicable. While the record shows the rentals for a few other properties used in the produce business, they are, as the court found, so dissimilar as to make the rentals paid for them worthless as a guide to what should be paid at the Kansas City Food Terminal.[2] More importantly, the comparative rental rule, while fairly applicable in the case of surplus property long on hand, does not fit the situation of a new property especially designed to meet the needs of the shipper and constructed to induce him to move to a particular railroad facility. In such a situation, the construction of the improvements is a matter of deliberate choice. There is no other commercial reason why the capital outlay for the

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[1] *Baltimore & Ohio R. R. Co.* v. *United States, supra,* p. 524; *Cleveland, C., C., & St. L. Ry. Co.* v. *Hirsch* (1913), 204 Fed. 849; *Freight Forwarding Investigation* (1938), 229 I. C. C. 201, 215, 216. *Leases and Grants by Carriers to Shippers* (1922), 73 I. C. C. 671; *Central of Georgia Ry. Co.* v. *Blount* (1917), 238 Fed. 292; *Smyth* v. *Ames* (1898), 169 U. S. 466; *The Minnesota Rate Cases* (1913), 230 U. S. 352; *St. Louis & O'Fallon Ry. Co.* v. *United States* (1929), 279 U. S. 461; *Los Angeles Gas & Electric Corp.* v. *Railroad Commission* (1933), 289 U. S. 287.

[2] "No similar facilities exist in the immediate neighborhood of the food terminal, if any exist in the United States."—Finding of Fact 43, R. 65.

building of new facilities should be made unless a fair return is to be received. Traffic reasons may not properly be taken into account, for to do so would result in an indirect purchase of the shipper's traffic. If going rental rates in the community are so low as to preclude the possibility of a fair return, the new construction is not justified.[1]

The out-of-pocket expense test is even more plainly confined to old and surplus property, as to which it may be allowable to take the best rental that may be obtained rather than to permit the property to remain idle and unproductive; but this is not the choice which confronts men who are considering the construction of new facilities. That was not the choice of the Union Pacific when it put over $3,600,000 into this enterprise.[2] No corporation uninfluenced by ulterior motives would embark its capital in a new enterprise where the prospective revenue would cover only maintenance and taxes, where the annual loss through depreciation would be uncompensated, and where it would receive absolutely no return on the money invested.

The test to be employed in the instant case is thus narrowed between a requirement of a return on the money invested and a requirement of a return on the value of the property. The investment test here has serious drawbacks: if it were applied, the shipper lessee would receive practically free of charge the use of the land and absolutely free of charge the part of the improvements paid for with public funds, thus making a gift to him in accordance with the purpose of the Union Pacific in promoting and financing the enterprise[3] but wholly at war with the ban on all such concessions contained in the Interstate Commerce Act and the Elkins Act.

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[1] *Lehigh Valley R. Co.* v. *United States* (1917), 243 U. S. 444, 445-6.
[2] Finding of Fact 13, R. 346-7; Finding of Fact 16, R. 349-50.
[3] Finding of Fact 10, R. 343-4.

There has been little investment in the land used for market purposes; the only cost that has been incurred is for the filling to bring the land up to the level of the surrounding area to reduce the danger from floods.[1] However, there was an active demand for the land; in fact Mr. Stanley urged that quick action be taken with respect to the construction of the terminal in order to forestall use of the property for other commercial purposes.[2] It would be obviously improper to exclude entirely or to include at a nominal figure land which is currently being rented by the City for 3.6 cents per square foot based on a six per cent return on a value of sixty cents per square foot.[3]

Despite the contention of the appellants to the contrary, the standard for determining the point below which rentals cease to be lawful in situations of this kind is best judged by reference to the analogy of confiscation cases. In those cases the property owner is entitled to relief only to the extent absolutely necessary to prevent his property from being taken away by governmental action without due process of law. The fixing of rates yielding less than a minimum fair return is uniformly held to represent a taking of property from its owner. On the same principle, where a railroad or an owner of transportation facilities or a person associated with one or the other charges a shipper less than a fair minimum rental determined in the same way it necessarily makes a gift to the shipper of property in the amount of the difference, which is unlawful under the statutes. The confiscation cases are pertinent not because the court is here engaged in a rate-making function, legislative or administrative in character, but merely because they present an analogy by which the exact point may be determined at which the rentals in leases of this type cease to be lawful

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[1] Stanley to Benham, December 9, 1936, Exhibit 2, p. 4, R. 1487.
[2] Stanley to Benham, December 9, 1936, Exhibit 2, p. 4, R. 1487.
[3] Exhibit 148, R. 2946; Exhibit 71, R. 2738.

and become so low as to constitute a device for rebates and concessions in violation of the statutory prohibitions. This is well illustrated in the cases arising under the Elkins Act, which hold that railroad property in the form of money may not be used by a shipper without the payment of interest as a return on the carrier's capital.[1] By a parity of reasoning, property in the form of lands and buildings may not be devoted to the shipper's use without payment of a return on the value of such capital assets. In either case there must be compensation for the use of the capital whether it be in the form of money or warehouses.

2. *The Court Properly Held That Rentals Must Be Based Upon Full Value of Terminal Property.*

The original cost of the wholesale produce buildings is $2,029,803 as compared with estimated reproduction cost of $1,917,211.[2] The market facilities were recently constructed. Construction commenced the early part of 1939 and the market was placed in operation December 4, 1939.[3] Original cost of construction continues fairly well to measure reproduction cost so long as there is no change in the level of applicable prices.[4] Under the circumstances, it would be correct to assume that the original cost of the produce buildings represents the value thereof.

The standard enforced by the order granting the permanent injunction requires that the proper rate of return be measured by the net yield upon "the full value of the

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[1] *Vandalia R. Co.* v. *United States* (1915), 226 Fed. 713; *United States* v. *Hocking Valley Ry. Co.* (1911), 194 Fed. 234 (1914), 210 Fed. 735 (certiorari denied, 234 U. S. 757).

[2] Finding of Fact No. 38, R. 362-3.

[3] Boice, R. 1235; Ex. 277, R. 3371.

[4] *McCardle* v. *Indianapolis Water Company* (1926), 272 U. S. 400, 411; *Los Angeles Gas & Electric Corporation* v. *Railroad Commission* (1933), 289 U. S. 287, 306; *Railroad Commission of California* v. *Pacific Gas & Electric Co.* (1933), 302 U. S. 388, 398.

market facilities as a whole." The value thus defined includes the full value of the Public Levee lands owned by Kansas City, Kansas, and the full value of the market structures without deduction because of funds in aid of construction received from the Public Works Administration.[1] Appellants challenge the inclusion of the current market value of the Public Levee lands and the inclusion of the proportionate values represented by the contribution toward the cost of construction made by the Public Works Administration.

Lease of facilities by rail carriers engaged in interstate commerce to shippers and receivers of freight in interstate commerce at rentals which do not provide a proper return upon the value of the facilities leased constitutes the giving and receiving of rebates and concessions in violation of the Interstate Commerce Act and the Elkins Act. The proper subject of inquiry in such instances is the value of the entire property the use of which is accorded shippers—not the cost of acquisition of such property by the rail carrier or those associated with it. The value of property upon which the owner may demand a return is not affected by the fact that a portion thereof which is devoted to public use may have been acquired

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[1] In Conclusions of Law Nos. 20 and 21, R. 374-5, the lower court stated:

"The full value of public levee land owned by a municipal corporation must be included in the total value of facilities leased to interstate shippers in determining rentals required to prevent violation of the Interstate Commerce Act and the Elkins Act prohibiting the giving and receiving of rebates, concessions, advantages, and discriminations when such land is leased by the municipal corporation in its proprietary capacity and as a participant with an interstate rail carrier in a joint project or undertaking to provide such facilities, the municipal corporation, under such circumstances, having the same status as the interstate rail carrier with which it has become associated.

* * * * * * *

"The fair value of the property will be used in determining the rate of return. The source of the invested capital and whether that capital was borrowed or was donated will not affect the fair value."

without cost, *San Joaquin Company* v. *Stanislaus County* (1914), 233 U. S. 454, 459-460, or by the fact that certain funds may have been contributed toward the cost of construction, *Board of Commissioners* v. *New York Telephone Co.* (1926), 271 U. S. 23, 31-32.

Original cost when used as a factor in ascertaining value represents the actual cost of the property at the time of its installation or construction without regard to the amount expended by the present owner. In *Smyth* v. *Ames*,[1] one of the factors mentioned by the court to be considered in the ascertainment of value was the present as compared with the original cost of construction. Obviously, the original cost of construction, used in this sense, applies to the cost of the physical property itself irrespective of who incurred such cost of construction.[2]

Rail carriers may not lease facilities to interstate shippers at inadequate rentals merely because some portion or all of the facilities in question have been acquired without cost. Otherwise, rail carriers could grant the use of donated property gratis to shippers. Lands donated by Federal and State governments and municipalities to aid in the construction of railroads could be leased for nothing. Clearly, no one would contend that such action would be lawful under the provisions of the Interstate Commerce Act and the Elkins Act. Shippers must pay adequate rentals upon the total value of the facilities leased. Such rentals must necessarily be based upon the total property leased.

The same rule applying to railroads, as already shown, applies with equal force to owners or operators of rail-

[1] (1898), 169 U. S. 466.

[2] See, also, *San Diego Land & Town Co.* v. *Jasper* (1903), 189 U. S. 439, 442-443; *Brooklyn Union Gas Co.* v. *Prendergast* (1925), 7 F. (2d) 628, 638-639; *P. C. & St. L. Ry. Co.*, 24 I. C. C. Val. Rep. 1, 18; Note 5 of dissenting opinion of Mr. Justice Brandeis in *Southwestern Bell Telephone Co.* v. *Public Service Commission* (1923), 262 U. S. 276, 294-295.

road facilities or persons associated with them. They may not give rental concessions with respect to transportation any more than a railroad. Any leases they may make to shippers and receivers of freight in interstate commerce at inadequate rentals are equally violative of the statutory ban on rebating. Like the rail carriers, they are obliged to exact full and adequate rentals upon all leased facilities regardless of the source of title of property or the funds used in its construction. The City must exact full and adequate rentals in all leases of property at the terminal. It is the owner of a transportation facility. It is associated with the Union Pacific in the operation of the terminal, and it is engaged in a joint undertaking or enterprise to provide such facilities to interstate shippers. It is therefore amenable to the statutes against rebates and concessions. For these reasons it must charge rentals which will yield a return upon the full value of the facilities leased, including the value of the public levee land and the proportion of the value of structures represented by the P. W. A. grant.

Nor does the order of the Interstate Commerce Commission sustained in *Baltimore & Ohio Railroad Co.* v. *United States, supra,* prescribing cost of service as the minimum rental for warehouse space, require that the amount of the Federal grant be excluded in calculating the rate of return provided by rentals established by Kansas City, Kansas. Nothing contained in the language of the Supreme Court in the *Baltimore & Ohio case* justifies such a conclusion. There is no intimation that the court in using the term "cost of service" assumed anything else than that the total cost of the property involved was given consideration in the Commission's order. Certainly there is no ground for the contention that the court by the use of the term "cost of service" intended to eliminate the cost of any of the leased property from consideration, no matter by whom incurred.

3. *The Court Correctly Held That a Proper Rate of Return Must Be Secured.*

The lower court held that any rentals charged at the new terminal insufficient to yield "a proper rate of return" upon property value after the payment of operating expenses are unlawful, and enjoined such rentals for the future.[1] The appellants assail the requirement of a proper rate of return. They seemingly concede that the rentals if subject to the statutes against rebating at all must be high enough to pay operating expenses, but they insist that there is no requirement that they must also yield a profit or a return on the capital employed. They cite in support of this contention the decisions of this Court in *Baltimore & Ohio R. R. Co.* v. *United States*[2] and *New Haven Railroad* v. *Interstate Commerce Commission.*[3]

Appellants, pointing out that this Court in *Baltimore & Ohio R. R. Co.* v. *United States, supra,* upheld an order of the Interstate Commerce Commission requiring the carriers to cease and desist from leasing property at non-compensatory rentals, proceed to contend that in so doing the Court established the general rule that rentals which are compensatory in the sense of meeting operating expenses fulfill all lawful requirements; and there is no obligation on the lessor to secure for the use of his property anything in addition to the sum required to meet such expenses, either as a return on the value of the property or otherwise.

The opinion of this Court in the *Baltimore & Ohio* case does not justify such a contention. There was a divergence of opinion between counsel for the rail carriers and counsel for the Interstate Commerce Commission respecting the matter when they appeared before the

[1] Order Granting Permanent Injunction, R. 378-9.
[2] (1939) 305 U. S. 507.
[3] (1906) 200 U. S. 361.

Court. The rail carriers who were seeking to have the Commission's order set aside, stated in their brief, "There is nothing strange or unusual in the circumstance that present fair value of leases may not equal 'cost,' if calculated to include, *as the Commission's reports seem to contemplate,* interest and depreciation on investment * * *,"[1] whereas the Commission's attorney stated, in its brief, "As to return on investment, the order does not require that appellants make warehousing and storage rates and space rentals that will yield a profit. It simply sets costs as the minimum. Where interest is properly a part of the cost, it is clear that it must be included * * *." (p. 512.) The Commission's attorney, also, added—

> "If appellants are in doubt as to whether in particular instances interest on investment is to be deemed a profit, or part of the costs, their proper procedure is to apply to the Commission for a ruling." (p. 512.)

The Court did not pass upon the precise question thus debated by counsel for the various parties in the proceeding, merely stating that Section 6(7) of the Interstate Commerce Act forbids the carrier to receive less than the published rates for transportation or to remit by any device any portion of the rates, and that "When services, not necessary for transportation, are furnished below cost in an effort to acquire rail transportation, as was done here, this provision was violated." The court below in the case at bar correctly observed:

> "It is argued by defendants that the effect of the B. & O. Ry. Co. v. United States, 305 U. S. 507, is an approval of a return that is merely compensatory. While that case may indicate such a conclusion on the part of the Interstate Commerce Commission, the Supreme Court merely approved the action of the Commission in for-

[1] 305 U. S. 507, 509.

bidding rates which failed to compensate the carriers for actual cost of providing the facilities and did not pass upon the question of whether an order of the Commission requiring a return in excess of actual cost would have been proper, the latter point not being presented by the record."

In *New Haven Railroad* v. *Interstate Commerce Commission*[1] it appeared that the Chesapeake & Ohio had contracted to sell coal to the New Haven at a total price insufficient to cover the cost of the coal at mines located on the Chesapeake & Ohio plus the cost of transportation and delivery between Newport News, Virginia, and Connecticut, including the published rates for transportation. The Supreme Court sustained an order of the Interstate Commerce Commission which required that the Chesapeake & Ohio cease selling coal purchased by it at less than the cost of the coal plus the tariff rate for its transportation. Appellants contend that the order of the Commission required no profit or return to the Chesapeake & Ohio upon its investment in the coal.[2] But the issue was not involved. The question whether an element of profit or return should be included in the cost was no more considered in the *New Haven case* than it was considered in the *Baltimore & Ohio case*. Whether or not any profit was included in the cost of the coal at the mines was not considered. All that the Commission's order required was the exaction by the Chesapeake & Ohio of a sufficient price to cover the cost of the coal at the mines plus the expense of transportation at published tariff rates. What was really involved in the case was the question whether or not a carrier which dealt in a certain commodity could eliminate a part of the cost of transportation from the sale price thereof.

There is not the slightest indication that this Court,

[1] (1906), 200 U. S. 361.
[2] Br. 254.

either in the *New York Warehouse* case or the *New Haven* case, indicated a disposition to overrule the cases which require that where a carrier allows the use of its capital assets by a shipper a fair rate of interest or return must be exacted.[1] While these cases deal with the use of the carrier's money by the shipper, there is, as already stated, no distinction in principle between lending money on the one hand and permitting the use of other forms of capital on the other.

The rule which should govern is entirely clear. "Cost of service," if it is to be a full and complete cost, includes the element of capital cost whether denominated interest, profit, or return. If money necessary for the prosecution of an enterprise is borrowed, the proprietor must pay interest thereon. If the proprietor devotes his own funds to the prosecution of the enterprise, he, nevertheless, sacrifices the return which he could secure upon his money if it were devoted to other purposes. Withholding of his own funds from other investment in which interest or profit could be received, therefore, constitutes capital cost in the same manner as though he had utilized borrowed funds and paid interest thereon. It follows that capital cost is incurred when facilities for the use of shippers are provided whether represented by interest paid on borrowed funds or funds withdrawn from other investment. Capital cost of both kinds is represented in the total investment in the property and, therefore, in the total worth or value of such property.

"Cost of service," as one of the principal factors in rate-making, properly includes an element of capital cost or profit. The phrase has been so understood by the Com-

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[1] *Vandalia Railroad Co.* v. *United States* (C. C. A. 7th Circuit, 1915); rehearing denied (1915), 226 Fed. 713. *United States* v. *Hocking Valley Ry. Co.* (1911), 194 Fed. 234; affirmed 210 Fed. 735; certiorari denied 234 U. S. 757.

mission in its administration of the Interstate Commerce Act. In *New England Divisions*,[1] it stated:

> "* * * *The cost of the service includes not only expenses of operation but taxes and the proper capital charges incident to the continued functioning of the property.*" (Italics ours.)

and in *Bedford Pulp & Paper Co.* v. *Chesapeake & Ohio Ry. Co.*,[2] it repeated practically the same language:

> "* * * *The cost of service, however, includes not only operating expenses but taxes and other charges properly incident to the functioning of the carriers' property in transportation service.*" (Italics ours.)

H. C. Spurr, in *Guiding Principles of Public Service Regulation* (1926), states that the elements of return and cost of operation together constitute the cost of the service:

> "* * * While the return is generally looked upon as company profit, it is merely an allowance for the cost of money and management, *and this and the cost of operation constitute the cost of the service.*" (Italics ours.) (Vol. 3, pp. 291-292.)

"Cost of Service" thus includes capital cost as well as operating cost. Return represents the particular element in cost of service which compensates for capital cost.

4. *The Proper Return on Full Value Must be Derived After Payment of All Operating Expenses.*

The "proper rate of return" cannot, of course, be computed without deduction for all expenses of operation, including an annual charge for depreciation resulting from

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[1] (1922) 68 I. C. C. 196, 199.
[2] (1930), 163 I. C. C. 670, 673-674.

expiration of the useful service life of the facilities leased due to wear and tear, decay, inadequacy, and obsolescence which cannot be restored by current repairs and maintenance.[1] The Interstate Commerce Commission has consistently held in a long and uniform line of decisions that depreciation represents a loss of investment and of value which must be deducted in ascertaining the value of property, and is also an item of expense which should in one way or another be reflected in any accounting of operating expenses.[2] Furthermore, the Commission has expressly decided that depreciation must be taken into account as an operating expense in determining the minimum lawful rental which must be provided in leases of property by railroads to shippers under the terms of the Interstate Commerce and Elkins Acts.[3] The lower court rightly held that in determining the rate of return which must be received upon the value of facilities specially constructed for or leased to shippers and receivers of freight engaged in interstate commerce, there must first be deducted all expense of operation, including an annual charge for depreciation.[4]

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[1] *Knoxville* v. *Knoxville Water Co.* (1908), 212 U. S. 1, 13-14; *Board of Commissioners* v. *New York Telephone Co.* (1926), 271 U. S. 23, 31-32; *United Railways* v. *West* (1930), 280 U. S. 234, 254; *Lindheimer* v. *Illinois Bell Telephone Co.* (1934), 292 U. S. 151, 167-169.

[2] *Valuation of Texas Midland Railroad* (1918), 75 I. C. C. 1, 125-130, 183-186; *Valuation of San Pedro, Los Angeles & Salt Lake Railroad Co.* (1923), 75 I. C. C. 463, 487-488; *Valuation of Atchison, Topeka & Santa Fe Railway Company* (1927), 127 I. C. C. 1, 71-77; *Valuation of New York Central Railroad Company* (1929), 27 I. C. C. Val. Rep. 1, 40; *Valuation of Illinois Central Railroad Co.* (1933), 46 I. C. C. Val. Rep. 1, 99-102; *Excess Income of Richmond, Fredericksburg & Potomac Railroad Co.* (1931), 170 I. C. C. 451, 484-486; *Telephone and Railroad Depreciation Charges* (1926), 118 I. C. C. 295; id. (1931) 177 I. C. C. 351; *Depreciation Charges of Carriers by Water* (1935), 210 I. C. C. 259.

[3] *Propriety of Operating Practices—New York Warehousing* (1936), 216 I. C. C. 291, 336-337.

[4] Memorandum Opinion on Final Hearing, R. 338; Conclusion of Law 19, R. 374; Findings of Fact 39 and 40, R. 364.

Conclusion.

The District Court correctly held that the appellants had violated the Elkins Act and the Interstate Commerce Act. It properly restrained continuation of the unlawful practices and its decree should be affirmed.

Respectfully submitted,

WILLIAM E. KEMP,
HALE HOUTS,
LESLIE A. WELCH,
ANDREW C. SCOTT,
ROLAND J. LEHMAN,
JOHN N. MONTEITH,
CHRISTOPHER B. GARNETT,
JONATHAN C. GIBSON,

Counsel for City of Kansas City, Missouri; Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, Trustees of The Chicago, Rock Island and Pacific Railway Company; Guy A. Thompson, Trustee of Missouri Pacific Railroad Company; Chicago, Burlington & Quincy Railroad Company; and The Atchison, Topeka and Santa Fe Railway Company, Appellees.

April 2, 1941.

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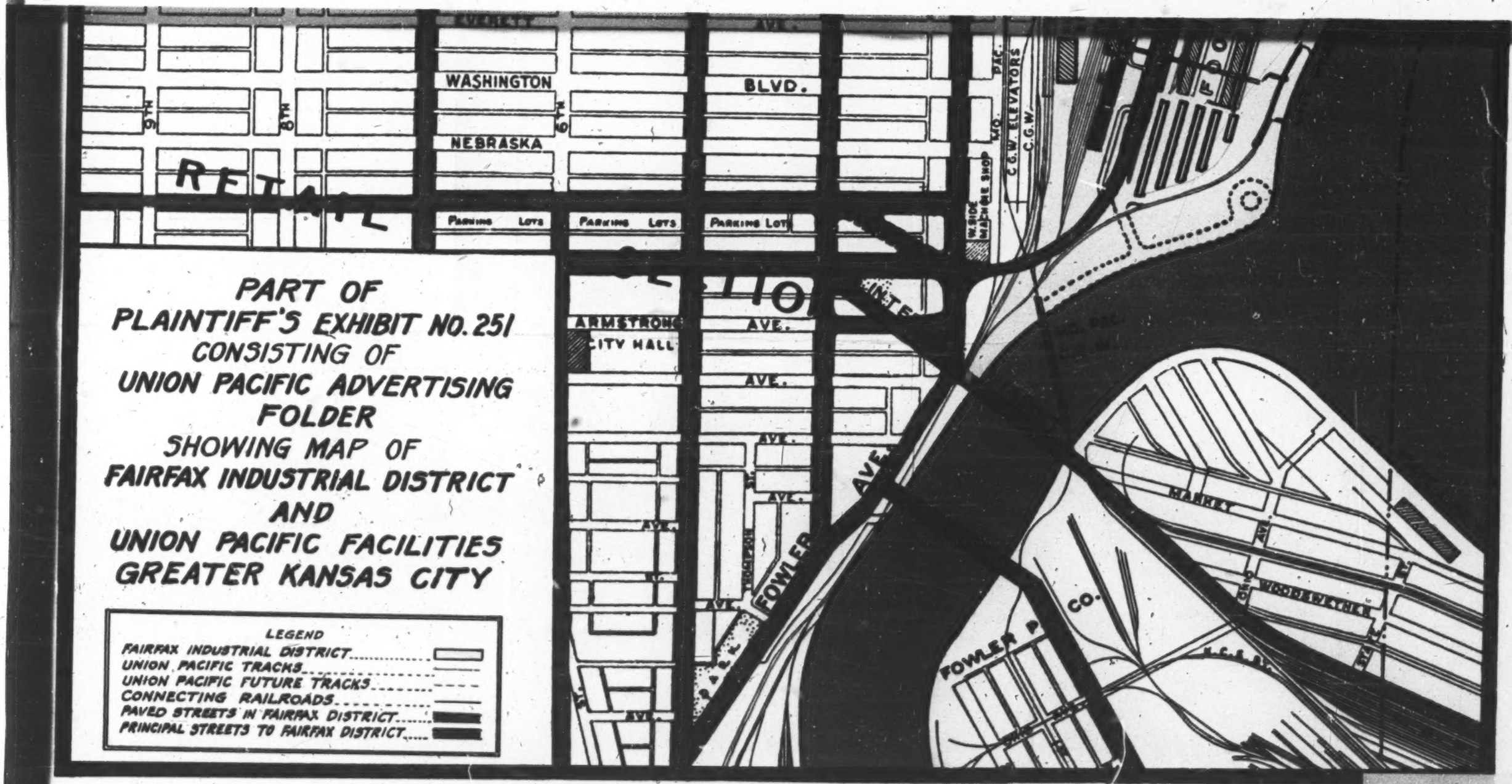
PORTION OF PICTURE OF KANSAS CITY FOOD TERMINAL AND OTHER PUBLIC LEVEE IMPROVEMENTS INTRODUCED IN EVIDENCE AS UNION PACIFIC EXHIBIT 232, REDUCED APPROXIMATELY ONE-FOURTH.

UNION PACIFIC ET AL. VS. UNITED STATES ET AL.
NO. 594 OCTOBER TERM, 1940

APPENDIX A.

GEORGIA AVE.
ROWLAND
CLEVELAND AVE.
HASKELL AVE.
WAVERLY AVE.
GREELEY AVE.
QUINDARO BLVD.
STEWART AVE.
PARALLEL AVE.
TROUP
GARFIELD AVE.
FRANKLIN AVE.
WALKER AVE.
NEW JERSEY
FREEMAN AVE.
OAKLAND AVE.
EVERETT AVE.
WASHINGTON BLVD.
NEBRASKA
LAFAYETTE
ALLIS
HALLOCK ST.
TREMONT
Jersey Creek
MO. PAC.
KAS. & MO. RY. & TERMINAL (K. C. S.)
GILMAN GRANITE
FAIRFAX
U.P. FREIGHT SUB STATION
PHILLI
PHILLIPS PETROLEUM CO.
PHILLIPS PETROLEUM
WESTERN TERRACO
WATER ST.
1ST AVE.
2ND AVE.
3RD AVE.
4TH AVE.
5TH AVE.
6TH AVE.
MO. PAC.
C.G.W.
RIVERHAUL ELEVATORS
POD
TE
R. M. H.


PART OF
PLAINTIFF'S EXHIBIT NO. 251
CONSISTING OF
UNION PACIFIC ADVERTISING
FOLDER
SHOWING MAP OF
FAIRFAX INDUSTRIAL DISTRICT
AND
UNION PACIFIC FACILITIES
GREATER KANSAS CITY
LEGEND
FAIRFAX INDUSTRIAL DISTRICT
UNION PACIFIC TRACKS
UNION PACIFIC FUTURE TRACKS
CONNECTING RAILROADS
PAVED STREETS IN FAIRFAX DISTRICT
PRINCIPAL STREETS TO FAIRFAX DISTRICT
WASHINGTON
BLVD.
NEBRASKA
9TH
8TH
6TH
RETAIL
PARKING LOTS
PARKING LOTS
PARKING LOT
ARMSTRONG
CITY HALL
AVE.
AVE.
AVE.
AVE.
AVE.
AVE.
FOWLER
FOWLER
PACIFIC
W. SIDE MACHINE SHOP
U.P.
C.G.W. ELEVATORS
C.G.W.
MARKET
WOODLAWN
CO.

APPENDIX B.